91-276 ①
No. 91-______

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

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ENVIRODYNE INDUSTRIES, INC.,

Petitioner,

—v.—

FRANK LUMPKIN, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

If the petition for certiorari is granted, the questions presented are:

1. Whether, in light of this Court's recent decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 59 U.S.L.W. 4688 (June 20, 1991) (No. 90-333) (to be reported at 111 S. Ct. 2773 (1991)), the timeliness of federal claims for employee benefits under a plan governed by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, should be governed by the uniform limitations period that is repeatedly provided in ERISA for closely analogous claims, rather than the widely varying limitations periods that are provided in state statutes of limitations?

2. Whether, if no uniform federal limitations period is to be applied, this Court's decision in *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), and federal policy under ERISA mandate that the timeliness of federal claims for employee benefits be governed by the Illinois five year statute of limitations for contracts not exclusively in writing (the period concededly applicable under the law of the forum state), rather than the different state limitations period that the court below selected to achieve its preferred outcome?

PARTIES TO THE PROCEEDING

The parties to the proceeding, in addition to those named in the caption, are a certified class of former employees of WSC Corporation who were represented for the purpose of collective bargaining by the Progressive Steel Workers Union ("PSWU") or belonged to other bargaining units at the Wisconsin Steel Mill who were plaintiffs below and are respondents in this Court. The Wisconsin Steel Mill was operated by an unincorporated division of International Harvester Corporation (now known as Navistar, Inc.) until it was sold in 1977 to EDC Holding Company, a wholly owned subsidiary of petitioner Envirodyne Industries, Inc. and the parent of WSC Corporation. The named class representatives are: Frank Lumpkin, Rafael Alvarez, Delbert C. Auguston, Wayne Schwartz, Felix Vasquez and John Randall.

The following information is provided pursuant to Rule 29.1 of the Court: Petitioner Envirodyne Industries, Inc. is a corporation. Its parent corporation and sole shareholder is Emerald Acquisition Corporation. A majority of the outstanding shares of Emerald Acquisition Corporation common stock are beneficially owned by Salomon Brothers Holding Company Inc, a wholly owned subsidiary of Salomon Inc. Envirodyne Industries, Inc. has no subsidiaries that are not wholly owned subsidiaries or indirect wholly owned subsidiaries.

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IN THE

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OCTOBER TERM, 1991

ENVIRODYNE INDUSTRIES, INC.,

Petitioner,

—v.—

FRANK LUMPKIN, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Envirodyne Industries, Inc. (''Envirodyne'') respectfully prays that a Writ of Certiorari issue to review the judgment and decision of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on May 17, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit (1a)[1] is reported at 933 F.2d 449 (7th Cir. 1991). The Memorandum Opinion and Order of the District Court for the Northern District of Illinois, Eastern Division granting respondents' motion for certification of the class and granting petitioner's motion to dismiss (32a), is reported unofficially at 11 Employee Benefits Cases 2580 (N.D. Ill. Nov. 7,

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[1] References to the Appendix hereto are cited ''__a''.

1989), 1989 WL 152300 and 1989 U.S. Dist. LEXIS 13303. The District Court's Memorandum Opinion and Order denying respondents' motion to reconsider the dismissal of the action (40a), is reported unofficially at 1990 WL 7086 and 1990 U.S. Dist. LEXIS 451 (N.D. Ill. Jan. 18, 1990).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on May 17, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The case involves Section 502 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132, and Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, as well as the statutes of limitation that are contained in ERISA Sections 413, 4003(e)(6), 4003(f)(5), 4070 and 4301, 29 U.S.C. §§ 1113, 1303(e)(6), 1303(f)(5), 1370 and 1451, all of which provide that suits brought under such sections must be brought within three years after discovery but not more than six years from the accrual of the claim being asserted, except in case of fraud or concealment. The text of these statutory sections is set out in full in the Appendix (43a). The decision below applied the Illinois statute of limitations for actions on a contract entirely in writing and considered the statute governing contracts not entirely in writing, Ill. Ann. Stat. ch. 110, ¶¶ 13-205 and 13-206 (Smith-Hurd 1984), each of which also is set out in the Appendix (62a).

STATEMENT OF THE CASE

This action is brought by a plaintiff class consisting of approximately 2,700 former employees of the Wisconsin Steel Works against petitioner Envirodyne to recover benefits under a collectively bargained employee benefit plan maintained by Envirodyne's subsidiaries and to which Envirodyne was not a party. The last in a series of related litigations, it was filed nine years after the cause of action accrued and over seven years after the same plaintiffs sued the mill's previous owner to recover the same sums.

A. The Facts

In 1977, International Harvester Company (now Navistar International Transportation Corporation) ("Navistar") sold its Wisconsin Steel Division to EDC Holding Company ("EDC"), a wholly-owned subsidiary of Envirodyne. The transaction was structured as a leveraged buyout whereby EDC paid $15 million and other consideration to acquire the assets of the Division. EDC gave Navistar a mortgage covering certain assets in the amount of $50 million, and assumed pension and contractual obligations that had accrued under Navistar's ownership.

In 1980, Navistar unexpectedly foreclosed on its mortgage, causing EDC and its subsidiaries immediately to cease operations and file a petition under Chapter 11 of the Bankruptcy Code which remains pending.[2] The bankruptcy spawned a number of lawsuits.

In 1981, respondents sued Navistar, claiming that it was responsible for the pension and welfare benefits accrued both before and after the sale to EDC. This suit was settled in 1988 for $14.8 million. Respondents also filed claims for these benefits in the Chapter 11 proceeding which were released as part of the Navistar settlement. Respondents did not join Envirodyne (which was never in Chapter 11) as a defendant in their suit against Navistar.

In addition, respondents recovered the insured portion of their pension benefits from the Pension Benefit Guaranty

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[2] As the Seventh Circuit observed in an opinion arising from the debtor-in-possession's claims against Navistar, EDC's operation of the business from 1977 through 1980 permitted "[s]ome of the workers. . . [to] h[o]ld on to their jobs for three more years. . . ." than otherwise would have occurred. *In re EDC, Inc.*, 930 F.2d 1275, 1281 (7th Cir. 1991).

Corporation ("PBGC"). In turn, the PBGC commenced an action against Navistar and Envirodyne in 1981 to recoup the benefits it paid.[3]

On February 17, 1989, nine years after EDC's bankruptcy, over seven years after respondents commenced their lawsuit against Navistar, and shortly after announcement of the arm's length sale of Envirodyne to its present owner, respondents sued Envirodyne, asserting that it was the alter ego of the bankrupt subsidiaries. On this theory, respondents claim that Envirodyne is accountable for over $80 million in unpaid pension and welfare benefits and interest charges which were not collected from Navistar or the PBGC. Count I of the Complaint seeks these benefits under section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), and Count II requests the same relief under section 301 of the LMRA, 29 U.S.C. § 185. Jurisdiction was predicated on these sections.

Envirodyne moved to dismiss the Complaint on the grounds that the respondent class released its claims in settling the action against Navistar and, alternatively, that the claims were untimely. On November 7, 1989, the District Court granted Envirodyne's motion, holding that the release of claims in the settlement agreement with Navistar barred respondents' claims against Envirodyne. Respondents filed a motion to reconsider which was denied on January 19, 1990 upon essentially the same grounds as the original order. In each decision, the District Court found it unnecessary to reach the statute of limitations issue.

B. The Seventh Circuit Decision

On May 17, 1991, the United States Court of Appeals for the Seventh Circuit reversed and remanded the case to the District Court for further proceedings. The Seventh Circuit considered the release to be ambiguous on its face and held that it was "necessary to define the parties' intent by looking to extrinsic and parol evidence" which was not sufficiently contained in the record on appeal. (13a).

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[3] The PBGC's claims against Envirodyne were based on Envirodyne's statutory liability to the PBGC as a parent company under ERISA § 4062, 29 U.S.C. § 1362, not on any alter ego theory. Early in the litigation, the PBGC and Envirodyne reached agreement on Envirodyne's statutory liability and the case was settled as to Envirodyne.

Addressing Envirodyne's contention that the claims were untimely, the Seventh Circuit further held that, under Section 502 of ERISA, the courts "must apply the most appropriate state statute of limitations so long [as] it is consistent with federal law and policy." (28a). The Seventh Circuit recognized that, in alter ego cases, the Illinois courts apply a five year statute of limitations for contracts which are not exclusively in writing. Nevertheless, the Court held that "as a matter of federal policy the longer [ten-year] statute of limitations [for written contracts] should apply" and further, that "there is no basis in federal law for characterizing their claims as an oral contract for purposes of the statute of limitations." (30a).

Accordingly, the Seventh Circuit concluded that its "decision paves the way for the plaintiffs to present their case against Envirodyne more fully in the district court." (30a).

REASONS FOR GRANTING THE WRIT

POINT I

CERTIORARI SHOULD BE GRANTED TO DETERMINE THE LIMITATIONS PERIOD FOR ERISA ACTIONS IN ACCORDANCE WITH CONGRESSIONAL INTENT AND TO ELIMINATE THE APPLICATION OF WIDELY VARYING STATE LAW RULES THAT FRUSTRATE CONGRESS' EXPLICIT PREEMPTION OF "ANY AND ALL" STATE LAWS

A. The Seventh Circuit's Decision Conflicts With The Fundamental Teaching Of *Lampf, Pleva.*

The Seventh Circuit's decision below applies a state law statute of limitations to permit claims under ERISA to be brought against a parent corporation on an alter ego theory for a subsidiary's benefit plan default—almost *nine* years after the claim arose and was discovered and more than *seven* years after plaintiffs commenced similar litigation against the business's former owner and filed claims in the subsidiary's bankruptcy proceedings. Yet ERISA itself explicitly sets three years as the limitations period for actions on directly analogous claims and expressly preempts "any and all" state law provisions relating to employee benefit plans.

Writing a month before this Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 59 U.S.L.W. 4688 (June 20, 1991) (No. 90-333) (to be reported at 111 S. Ct. 2773 (1991)), the Seventh Circuit did not consider the limitations periods set out in ERISA itself as a possible source of federal law to govern claims under ERISA § 502.[4] *Lampf, Pleva* applied a uniform limitations period from federal law to actions under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), reversing more than three decades of borrowing state law limitations periods by the lower courts.

As *Lampf, Pleva* now makes clear, the courts *must* consider federal as well as state sources of law in determining the limitations period applicable to federal claims for which Congress has not expressly provided a statute of limitations. Indeed, the Court's decision in *Lampf, Pleva* emphasizes that a limitations period contained elsewhere in the federal statutory scheme at issue is likely to provide the most compelling evidence of the Congress' intent and a better source of law for the courts to apply than a forum state's statute of limitations for unrelated claims.

Critically, ERISA contains several identical limitations periods for claims that are directly analogous to the ERISA claim asserted here. Each of these periods provides claimants three years from discovery of the claim, but not more than six years from accrual (except in case of fraud or concealment), to commence an action. ERISA §§ 413, 4003(e)(6), 4003(f)(5), 4070 and 4301, 29 U.S.C. §§ 1113, 1303(e)(6), 1303(f)(5), 1370 and 1451. Indeed, as discussed below, Congress' three year-six year limitations scheme was applicable to the plaintiffs in this very case with respect to their successful recovery of a portion of their benefits under the plan at issue here. *See* part I.C.2, *infra*, pp. 14-16. As with the securities law scheme in *Lampf, Pleva*, these limitations periods apply to claims each of which "is an integral element of a complex web of regulations" and "target[s] the precise dangers that are the focus of [§ 502]". *Lampf, Pleva*, 59 U.S.L.W. at 4690.

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[4] In light of the Seventh Circuit's unequivocal decisions applying only state law in *Central States S.E. & S.W. Areas Pension Fund v. Jordan*, 873 F.2d 149 (7th Cir. 1989) and *Jenkins v. Local 705 Int'l Brotherhood of Teamsters Pension Plan*, 713 F.2d 247 (7th Cir. 1983), and litigating prior to *Lampf, Pleva*, the parties did not argue that federal law was applicable.

In disregarding the ERISA scheme, the Seventh Circuit's opinion conflicts with the fundamental instruction of *Lampf, Pleva*. Moreover, the wide variance in the state limitations periods selected by other lower courts is wholly at odds with ERISA's clear purpose: to create a uniform federal law governing employee benefits. Certiorari should be granted and the decision below reversed or vacated to vindicate Congressional intent in accord with *Lampf, Pleva*.

B. The Existing Law Concerning The Limitations Period Applicable To ERISA § 502 Actions Is Chaotic, Involving Periods Ranging From Two To Twenty Years.

Current law regarding the selection of the limitations period to govern ERISA § 502 claims is in even more "disarray" than was the case with the claims under the Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j(b), at issue in *Lampf, Pleva*. *Ceres Partners v. GEL Assoc.*, 918 F.2d 349, 354-55 (2d Cir. 1990). The range of state law limitations periods applied by the lower courts to actions under Rule 10b-5, 17 C.F.R. § 240.10b-5 (1990), promulgated thereunder, was one to ten years. *See Ceres*, 918 F.2d at 354-55. The limitations periods applied to date by the lower courts to ERISA claims vary even more widely—from three years to fifteen years—and in states where the matter has not yet arisen, the same state law periods vary from two to twenty years.[5]

As was the case with securities law claims, a handful of lower courts have departed from the automatic borrowing of state law in setting the limitations period for ERISA claims. The Third Circuit and a district court in the Sixth Circuit have applied ERISA's explicit limitations period, rather than state law, to claims under the statute that were not expressly governed by it. *Edwards v. Wilkes-Barre Pub. Co. Pension Trust*, 757 F.2d 52, 55 (3d Cir.), *cert. denied*, 474 U.S. 843 (1985) (borrowing ERISA § 413 limitations period)[6]; *Sparks v. Ryerson & Haynes, Inc.*, 638 F. Supp. 56 (E.D. Mich. 1986) (borrowing ERISA § 413 limitations period).

Two other circuit courts have noted that they might reject state limitations periods in favor of ERISA's own provisions if they were writing on a slate free of earlier decisions in their circuits and this Court's pre-*Lampf, Pleva* analysis, *see Hawaii Carpenters Trust Funds v. Waiola Carpenter Shop, Inc.*, 823 F.2d 289, 297-98 (9th Cir. 1987); *Held v. Manufacturers Hanover Leasing Corp.*, 912 F.2d 1197, 1201 n.4 (10th Cir. 1990) (§ 510 action), but they perceived themselves bound to apply state law periods. So far as we are aware every other lower court has borrowed one of a variety of potentially applicable forum state statutes of limitations to govern claims under ERISA § 502.

1. The Courts Apply Widely Varying State Law Periods.

Significantly, courts looking to state law sources disagree on the appropriate state statute of limitations to apply to ERISA actions. Thus, various federal courts have applied state limitations periods applicable to claims for damages for withholding or detaining personal property, recovery of wages, breach of contact and others.[7] The majority of the circuits apply the forum state's contract statute of limitations, although in some states, including Illinois (the forum state below), that period itself varies depending upon whether the claim is on a written or oral contract.[8] The resulting law varies widely from circuit to circuit and state to state—the reported decisions apply limitations periods for essentially identical ERISA § 502 actions ranging from three to fifteen years.[9]

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[5] This Court has never addressed the appropriate limitations period under ERISA § 502.

[6] The Third Circuit has not consistently looked to federal law. *See Vernau v. Vic's Mkt., Inc.*, 896 F.2d 43, 45 (3d Cir. 1990) (in trustee's § 502 action to recover past due contributions, applying three year Pennsylvania wage payment and collection limitation period, without discussion of *Edwards* or ERISA statutory limitations periods).

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[7] For cases under § 502, *see, e.g.*, *Vernau v. Vic's Mkt., Inc.*, 896 F.2d 43, 45 (3d Cir. 1990) (applying Pennsylvania wage payment and collection statute of limitations); *Salyers v. Allied Corp.*, 642 F. Supp. 442, 444 (E.D. Ky. 1986) (withholding personal property or detaining personal property); *Central States S.E. & S.W. Areas Pension Fund v. Jordan*, 127 L.R.R.M. (BNA) 2795, 110 Lab. Cas. (CCH) ¶ 10,779 (N.D. Ill. 1987) (unwritten contracts), *rev'd*, 873 F.2d 149, 152-54 (7th Cir. 1989) (written contracts).

See also with respect to another section of ERISA that lacks an explicit statute of limitations, § 510 (relating to claims for interference with protected rights under ERISA), *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir.), *cert. denied*, 484 U.S. 979 (1987) (applying residual limitations period applicable to an employment discrimination claim); *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237, 1241-42 (11th Cir. 1989) (wage recovery (two years) and enforcement of statutory rights (20 years)); *Heideman v. PFL, Inc.*, 904 F.2d 1262, 1267 (8th Cir. 1990), *cert. denied*, _____ U.S. _____, 111 S. Ct. 676 (1991) (contracts); *McClure v. Zoecon, Inc.*, No. 90-1489 (5th Cir. July 11, 1991) (available at 1991 WL 123896 and 1991 U.S. Dist. LEXIS 14692) (applying wrongful discharge period; dissent would apply contract period); *Corkery v. SuperX Drugs Corp.*, 602 F. Supp. 42, 45 (M.D. Fla. 1985) (employee termination claims).

[8] States that distinguish between written and unwritten contracts include, for example, California, Cal. Civ. Code § 339 (West 1982) (two year period for unwritten contracts), § 337 (four years, written contracts); Kentucky, Ky. Rev. Stat. Ann. § 413.120 (Michie/Bobbs-Merrill 1972) (five years, unwritten contracts), § 413.090 (15 years, written); Illinois, Ill. Ann. Stat. ch. 110 ¶ 13-205 (Smith-Hurd 1984) (five years, unwritten), ¶ 13-206 (ten years, written); Indiana, Ind. Code Ann. § 34-1-2-1 (Burns 1986) (six years, unwritten), § 34-1-2-2 (ten years, written contracts entered into after 1982; 20 years, written contracts entered into before 1982); and Iowa, Iowa Code Ann. § 614.1.4 (West 1950 & Supp. 1991) (five years, unwritten), § 614.1.5 (ten years, written).

2. The States Disagree On The Appropriate Limitations Period For Contract Actions.

The limitations period for § 502 claims still would not be uniform even if every circuit court were to adopt the current majority view characterizing such claims as contract actions, because of the wide variation in the states' limitations periods for contract actions: state contract limitation periods range at least from as short as two years to as long as twenty years. *See, e.g.*, Cal. Civ. Code § 339 (West 1982) (two year period for oral contracts); Md. Cts. & Jud. Proc. Code Ann. § 5-101 (1989) (three year contracts period); D.C. Code Ann. § 12-301(7) (1981) (three year contracts period); Ky. Rev. Stat. Ann. § 413.090 (Michie/Bobbs-Merrill 1972) (15 year contracts period); Ind. Code Ann. § 34-1-2-2 (Burns 1986) (20 year period for written contracts entered into before 1982). This dramatic lack of consensus among the state legislatures as to the appropriate limitations period for contract actions makes that body of law particularly inappropriate as the source to govern federal claims under ERISA.

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[9] *See, e.g., Estate of Grant v. U.S. News & World Report, Inc.*, 639 F. Supp. 342, 347-48 (D.D.C. 1986) (three years); *Dameron v. Sinai Hosp. of Baltimore, Inc.*, 815 F.2d 975, 981-82 (4th Cir. 1987) (three years); *Cowden v. Montgomery County Soc'y For Cancer Control*, 591 F. Supp. 740, 754-55 (S.D. Ohio 1984) (15 years). In actions under ERISA § 510, which also lacks an explicit statute of limitations, courts have gone even further—the Eleventh Circuit has applied limitations periods of both *two* and *twenty* years to different claims under this section in the *same* action. *Clark*, 865 F.2d at 1241-42 (action under § 510 claiming that employees were terminated to avoid pension liabilities; court applied two year limitations period to back wages claim and 20 year period to reinstatement claim); *see also Corkery*, 602 F. Supp. at 45 (two years); *McClure, supra* (two years).

C. *Lampf, Pleva*'s Selection Of The Limitations Period Contained In The Same Federal Statute Directly Fits The ERISA Statutory Scheme.

ERISA and the LMRA form a comprehensive regulatory scheme intended to create a uniform federal law governing employee benefits. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981) (ERISA "establish[es] pension plan regulation as exclusively a federal concern"). Reliance on widely varying state law limitations periods disrupts this federal interest in uniformity.

1. The Limitations Periods Contained In ERISA, A Comprehensive Scheme Expressly Intended To Preempt State Law, Demonstrate Congressional Intent.

As this Court held in *Lampf, Pleva*, the central task of the courts in crafting a limitations period is to discern Congressional intent. When Congress has enacted a general scheme of federal law, Congress can be presumed to have intended that the logic of that scheme itself, not extraneous and unrelated state law, will be the primary source of interstitial lawmaking. As *Lampf, Pleva* holds, "consideration of state-law alternatives [is] unnecessary where Congress has provided an express limitations period for correlative remedies within the same enactment." 59 U.S.L.W. at 4691.

ERISA was enacted to provide a national solution to a national problem. "Because of the interstate character of employee benefit plans, the Committee believe it essential to provide for a uniform source of law." H.R. Rep. No. 533, 93d Cong., 1st Sess. 17, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4655; S. Rep. No. 127, 93d Cong., 1st Sess. 35, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4871.

In furtherance of this goal of national uniformity, ERISA contains a preemption provision that is "conspicuous for its breadth," *FMC Corp. v. Holliday*, ____ U.S. ____, 111 S. Ct. 403, 407 (1990), conclusively demonstrating Congressional intent to eliminate state legislation as a source of law in the pension area. ERISA § 514, 29 U.S.C. § 1144[10]; 120 Cong. Rec. 29933 (August 22, 1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 5177, 5188 (statement of Sen. Williams) ("It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions . . . are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans."); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983) ("section [514]'s pre-emptive scope [is] as broad as its language").

Thus, Congressional intent to create a uniform law is clear; it is entirely anomalous to conclude that the limitations period applicable to this uniform law must vary according to the forum in which the suit is filed. Congress expected that "a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans," 120 Cong. Rec. 29942 (August 22, 1974) (statement of Sen. Javits), not that the courts would simply absorb into Federal law the very "multiple and potentially conflicting State laws," *id.*, that Congress sought to preempt.

Lampf, Pleva rejects the presumption applied below that where Congress fails to provide an explicit statute of limitations it always intends that the courts borrow a limitations period from an analogous statute of the forum state.[11] As discussed in the following section, the limitations periods contained in ERISA itself clearly indicate Congress' balancing of the competing interests involved in setting a statute of limitations in precisely this context of employee benefit claims. Thus, the Congressional limitations period is a far "closer analogy," *Lampf, Pleva*, 59 U.S.L.W. at 4689 (plurality), *id.* at 4694 (Kennedy, J., dissenting) (each quoting *Reed v. United Transp. Union*, 488 U.S. 319, 324 (1989) and *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 171 (1983)), a "closer fit," *Lampf, Pleva*, 59 U.S.L.W. at 4690 (plurality), and a more appropriate source for interstitial lawmaking for ERISA actions than various state statutes of limitations that were enacted with entirely different considerations in mind. As the *Lampf, Pleva* Court held, there is "no clearer indication of how Congress would have balanced the policy considerations implicit in any limitations provision than the balance struck by the same Congress in limiting similar and related protections." *Id.* at 4690.

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[10] ERISA § 514 states, in pertinent part:

> Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b).

[11] Indeed, Congress itself has explicitly rejected this presumption, at least as to statutes enacted after 1990. The Judicial Improvements Act of 1990, § 313, 28 U.S.C. § 1658 establishes a four year limitations period for civil claims arising under Federal statutes enacted after its date where Congress has not otherwise provided a limitations period. *See Lampf, Pleva*, 59 U.S.L.W. at 4691 n.10.

The securities law claim at issue in *Lampf, Pleva* was judicially created, unlike ERISA § 502. Nevertheless, the *Lampf, Pleva* analysis is directly applicable here: ERISA is a comprehensive statutory scheme plainly intended to create a uniform federal law in an important area of federal interest, and each of § 502 and the other specific ERISA claims and their limitations provisions is "an integral element of [the same] complex web of regulations." *Id.* at 4690. Indeed, the evidence of Congress' intention to avoid application of state law is even more compelling here than in the context of the securities claim at issue in *Lampf, Pleva*, since ERISA's preemption clause is far more powerful than that contained in the securities acts. *Compare* ERISA § 514, 29 U.S.C. § 1144 (superseding "any and all State laws" relating to employee benefit plans) *with* Securities Exchange Act, § 28, 15 U.S.C. § 78bb (allowing states concurrent regulatory jurisdiction); Securities Act of 1933, § 18, 15 U.S.C. § 77r (similar).

2. Virtually Identical ERISA Actions For Employee Benefits Are Governed By The Explicit Limitations Period Set Out Elsewhere In ERISA.

Claims arising from a benefit plan often, as in this case, involve a number of ERISA's express rights of action, because no single provision may authorize the full amount of recovery sought by plan beneficiaries. No source of Congressional intent suggests that Congress—having created a uniform period to govern claims for one portion of the beneficiaries' recovery—nonetheless intends to have their claims for another portion of the same recovery, arising from the identical facts and circumstances, governed by highly variable state law limitations periods.

Thus, § 502, at issue here, provides for suits by beneficiaries against plans or their sponsors to enforce rights under employee benefit plans. In practice—as in this action—such a suit will ordinarily involve the *uninsured* portion of the benefits, since a suit involving the insured portion is generally brought under ERISA § 4003, which authorizes claims by and against the PBGC. Claims are brought against the PBGC if it has declined to pay insured benefits, and by the PBGC after it has paid such benefits in order to recover its payments from other responsible parties. Significantly, suits commenced by or against the PBGC are expressly governed by the limitations periods in ERISA §§ 4003(e)(6) and 4003(f)(5), 29 U.S.C. §§ 1303(e)(6), 1303(f)(5). Each of those subsections provides for a limitations period of three years from discovery of the claim, but not more than six years from accrual except in case of fraud or concealment.

Suits under § 4003 with respect to insured benefits are precisely analogous to suits commenced under § 502 to recover the remaining uninsured portion of the same employee benefits, since both involve disputes regarding contractual and statutory obligations under the identical plan. Thus, the policy considerations regarding the applicable limitations periods are identical and the periods should also be identical.

In contrast, application of a state law limitations period can lead to the perverse result—as in this very case—that plaintiffs would be permitted more time to bring suit to recover the portion of their benefits which Congress chose to leave uninsured than to sue the PBGC to obtain the federally insured portion of their benefits, which Congress determined was entitled to more protection. This turns the Congressional scheme on its head.

Furthermore, all suits regarding breach of fiduciary duty or an employer's termination liability upon the termination of a benefit plan, whether involving insured or uninsured benefits, are also covered by explicit statutes of limitations providing for the identical three year-six year period. ERISA §§ 413, 4070, 4301, 29 U.S.C. §§ 1113, 1370, 1451.

Indeed, each time Congress has amended ERISA to add a statute of limitations, it has used this same three year-six year period. Section 413, covering actions for breach of fiduciary duty, was contained in the original House bill and in ERISA as originally enacted. When Congress later expanded the substantive reach of the Act, it enacted new statutes of limitations—each providing for the same period—to cover the new claims. Thus, the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 added ERISA § 4301 as a limitations period for "an action under the bill." 126 Cong. Rec. 20202 (July 29, 1980) (Joint Explanation of S1076: Multiemployer Pension Plan Amendments Act of 1980). Similarly, the limitations periods of §§ 4003 and 4070 were added by the Single Employer Pension Plan Amendments Act of 1986, Pub. L. No. 99-272, § 11014, 100 Stat. 261-64 (1986), which comprehensively overhauled the enforcement mechanisms of Title IV (concerning plan termination insurance), and together with § 4301, they cover all actions under Title IV.

In short, in Congressional revisions and enactments of various different parts of ERISA over a 12 year period, Congress has repeatedly set the same three year-six year limitations period to govern every claim for which it has considered the limitations question. Nothing in ERISA itself or its legislative history suggests that by not specifying a limitations period for § 502, Congress intended—after explicitly preempting *all* state law in this area, *see supra*, p. 11-12—to bring in through the back door all the uncertainty and variation of state law by having federal courts look only to state law to fill this lacuna in the enactment.

D. Sensible Administration Of Federal Benefits Law Compels Application Of ERISA's Explicit Limitation Period.

The remaining considerations in the *Lampf, Pleva* analysis—the need for uniformity and predictability to serve federal policy and judicial economy and the multistate nature of actions under the relevant statute—compel the selection of the ERISA limitations period for ERISA claims.

1. Uniformity Is Particularly Important Because Of The Multi-State Nature Of Much Litigation Under ERISA.

State by state determinations of the applicable limitations period for claims under ERISA § 502 are particularly problematic because many benefit plans are multi-state. *See, e.g.*, *Robbins v. Iowa Road Builders Co.*, 828 F.2d 1348, 1353 n.3 (8th Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988) (court troubled by applying a state's statute of limitations period to claims regarding multi-state plan); *Held v. Manufacturers Hanover Leasing Corp.*, 912 F.2d 1197, 1199-1200, 1202-03 (10th Cir. 1990) (considering difficult choice of law issues in determining which state's law to apply); *cf. FMC Corp. v. Holliday*, 111 S. Ct. at 408 (ERISA's broad pre-emption clause intended to avoid "inefficiencies" that might result from "an environment of differing State regulations"). Even small plans will often cover employees or plants in different states—as is the case in the instant action.

As with RICO and the federal securities laws, actions under ERISA § 502 (and LMRA § 301) are often multistate in nature. Thus, the reasoning that compelled the Court to apply a uniform federal limitations period to actions under RICO, rather than looking to state law, is equally applicable here:

> The multistate nature of RICO indicates the desirability of a uniform federal statute of limitations. With the possibility of multiple state limitations [periods], the use of state statutes would present the danger of forum shopping and, at the very least, would 'virtually guarante[e] . . . complex and expensive litigation over what should be a straightforward matter.'

Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 154 (1987) (citations omitted).

Indeed, in states with "borrowing statutes," different plaintiffs may have different applicable limitations periods even in the *same* action, resulting in a tremendous waste of judicial and pension plan resources.[12] For instance, in this action, a relatively small single-employer benefit plan covering only one plant in Illinois involves beneficiaries who reside in at least two states.[13]

Thus, even in a litigation involving a relatively simple benefit plan, limitations periods of multiple states potentially are involved. Not only does the District Court have to make a separate determination of which statute to apply with respect to each state, but the resulting limitations period *in a single lawsuit* could vary from 2 to 20 years, depending on the accident of the individual plaintiffs' current and former residences. As this Court has recognized, such a situation is a powerful justification for application of uniform federal law. *Agency Holding*, 483 U.S. at 150, 154; *Reed v. United Transp. Union*, 488 U.S. 319, 326 (1989) ("diversion of resources to collateral statute-of-limitations litigation would be foreign to the central purposes of [LMRDA] § 101(a)(2), and thus we are persuaded that all claims under that provision should be characterized in the same way"); *Wilson v. Garcia*, 471 U.S. 261, 274 & n.33 (1985) (uniform law of limitations necessary under 28 U.S.C. § 1983 to eliminate situation where "multiple periods of limitations would often apply to the same case").

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[12] Typical state borrowing statutes provide that where a cause of action arises out-of-state, the forum shall apply the shorter of its own statute of limitations or the statute of the other state. *See, e.g.*, Ill. Ann. Stat. ch. 110, ¶ 13-210 (Smith-Hurd 1984). The borrowing statute often is interpreted to preclude an out-of-state plaintiff from obtaining a longer limitations period than could be obtained in his or her home state. *See, e.g.*, *Ceres Partners v. GEL Assoc.*, 918 F.2d 349, 353 (2d Cir. 1990); *Strong v. Lewis*, 204 Ill. 35, 68 N.E. 556 (1903); *LeBlanc v. G.D. Searle & Co.*, 178 Ill. App. 3d 236, 533 N.E.2d 41 (1st Dist. 1988), *leave to appeal denied*, 125 Ill. 2d 566, 537 N.E.2d 811 (1989) (Illinois borrowing statute requires applying limitations law of state of plaintiff's residence).

[13] While no details regarding the members of the class appear in the record in this action, the class certified is the same class as was certified in *Lumpkin v. International Harvester Co.*, 81 Civ. 6674 (N.D. Ill.). *See* District Court opinion on motion to dismiss (34a). The complaint in that action alleges that "all or nearly all other plaintiff class members are citizens of Illinois or Indiana."

2. Lack of Uniformity Wastes Judicial And Pension Fund Resources.

The wide variation in limitations periods makes rational planning impossible for multi-state plans, sponsors and fiduciaries, who may have unknown and certainly contingent liabilities in uncertain amounts for indeterminate periods of time, as well as for pensioners, who may lose actions for benefits in mistaken reliance on longer statutes of limitations.

Furthermore, the uncertainty and opportunities for litigation tactics lead to delay and increased cost over a peripheral issue. The burden of this delay and expense ultimately may be borne by pension funds and their beneficiaries, contrary to any intent of the statute. *FMC Corp. v. Holliday*, 111 S. Ct. at 408. Thus, ERISA is a classic example of a statute where "a uniform statute of limitations is required to avoid intolerable 'uncertainty and time-consuming litigation.' " *Agency Holding Corp. v. Malley-Duff & Assocs. Inc.*, 483 U.S. 143, 150 (1987) (citing *Wilson v. Garcia*, 471 U.S. 261, 272 (1985)).

POINT II

CERTIORARI SHOULD BE GRANTED TO CLARIFY THE RELATIONSHIP BETWEEN THIS COURT'S DECISIONS IN *LAMPF, PLEVA* AND *HOOSIER CARDINAL* WITH RESPECT TO FEDERAL EMPLOYEE BENEFIT CLAIMS

A. The Court Should Clarify That *Hoosier Cardinal* Does Not Apply To This Hybrid LMRA-ERISA Claim.

This action is a hybrid, involving not only the claim under ERISA § 502 to enforce rights under the employee benefit plans discussed in POINT I, but also a claim under LMRA § 301 to enforce a collective bargaining agreement.

This Court's decision in *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 705-06 (1966), determined that in an action brought under § 301 of the LMRA, the limitations period ordinarily is to be determined by reference to the closest analogy in the law of the forum state.[14] In *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), however, the Court limited *Hoosier Cardinal*, and held that in a hybrid action alleging both breach of the collective bargaining agreement and breach of the union's duty of fair representation, a uniform limitations period borrowed from the NLRA would apply.

This action, like *DelCostello*, is a hybrid action involving "inextricably interdependent" claims that should be governed by the same statue of limitations. *DelCostello*, 462 U.S. at

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[14] *Hoosier Cardinal* upheld the application of Indiana's limitations period for unwritten contracts to an action under LMRA § 301 on a collective bargaining agreement, where reference to parol evidence was required to establish plaintiffs' standing to enforce it. As is shown in POINT III below, Illinois law, like Indiana law, distinguishes between written and unwritten contracts and applies its limitations period for unwritten contracts to actions where parol evidence is necessary, including actions based on an alter ego claim. Accordingly, the Seventh Circuit misapplied *Hoosier Cardinal* in determining to disregard settled Illinois law and apply the written contracts limitations period to this alter ego action.

164-65. As several lower courts have recognized, this type of LMRA action to enforce pension benefits is virtually identical to the parallel ERISA action and should be governed by the same statute of limitations.[15] Indeed, the Seventh Circuit in the decision below applied the same limitations period to both claims without discussion.

The legislative history also noted the close connection between the two claims:

> [W]ith respect to suits to enforce benefit rights under the plan or to recover benefits under the plan which do not involve application of the Title I provisions, they may be brought not only in U.S. district courts but also in State courts of competent jurisdiction. All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor Management Relations Act of 1947.

Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 65-66 (1987) (quoting H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 327, *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5107).

As is shown in POINT I above, the appropriate limitations period for the ERISA § 502 claim in this action is the three year-six year period provided by Congress for other actions under ERISA. Certiorari should be granted to clarify that *DelCostello* limits *Hoosier Cardinal* at least to the extent that both parts of this hybrid ERISA § 502-LMRA § 301 claim should be governed by one limitations period: the three year-six year limitations period set out in ERISA.

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[15] *See, e.g.*, *Adams v. Gould, Inc.*, 739 F.2d 858 (3d Cir. 1984) (applying ERISA § 413 limitations period to LMRA § 301 claim), *cert. denied*, 469 U.S. 1122 (1985); *Sparks v. Ryerson & Haynes, Inc.*, 638 F. Supp. 56 (E.D. Mich. 1986) (combined ERISA/LMRA claim for pension benefits; court applied ERISA § 413 period); *Smith v. ABS Indus., Inc.*, 653 F. Supp. 94, 101 (N.D. Ohio 1986) (same); *see also DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983) (borrowing uniform federal limitations period for another type of hybrid § 301 action).

B. This Court Should Clarify The Tension Between *Hoosier Cardinal* And *Lampf, Pleva* With Respect To § 301 Claims Generally.

Lampf, Pleva also applies to the LMRA § 301 claim in this action, even if it is analyzed separately from the companion ERISA claim. *Lampf, Pleva* requires that the courts look to federal law for a limitations period where a claim is based on a judicially implied cause of action. *Hoosier Cardinal*, on the other hand, created a presumption that a missing limitations period "is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations . . . unless [state law] is unreasonable or otherwise inconsistent with national labor policy." *Hoosier Cardinal*, 383 U.S. at 705-706.

The LMRA § 301 cause of action, though explicit, is functionally equivalent to a judicially implied cause of action, because Congress purposefully left the entire dimensions of the action to the judiciary to create in a common law manner. *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957) (determining that § 301 creates a federal law of collective bargaining agreements); *see also Nedd v. United Mine Workers of America*, 556 F.2d 190, 203 (3d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978) (implying right of action under another section of the LMRA; court characterizes issue as "not unlike that considered in *Textile Workers*"). Since a § 301 claim is equivalent to an implied right of action, this Court may conclude that, on further consideration in light of *Lampf, Pleva*, that all § 301 claims should be decided under a uniform federal statute of limitations, rejecting the variable results which have flowed from the *Hoosier Cardinal* decision.

Alternatively, since some claims brought under § 301 may not implicate any other federal law or policy, *Hoosier Cardinal* may retain vitality in those cases. At a minimum, this Court should clarify that in those § 301 cases in which other closely related federal statutes are implicated, as is the case here, the best source of Congressional intent is such federal law and *Hoosier Cardinal* does not require the use of state limitations periods.

POINT III

CERTIORARI SHOULD BE GRANTED BECAUSE THE SEVENTH CIRCUIT'S DETERMINATION OF THE APPROPRIATE LIMITATIONS PERIOD UNDER ERISA AND SECTION 301 MISCONSTRUES FEDERAL POLICY UNDER ERISA AND CONFLICTS WITH THIS COURT'S DECISION IN *HOOSIER CARDINAL* AND THE DECISIONS OF OTHER COURTS OF APPEAL

If state law continues to supply the limitations period for federal employee benefit claims after *Lampf, Pleva*, a Writ of Certiorari should issue because the Seventh Circuit's selection of the state law period is based on a fundamental misapprehension of Congress' intent in ERISA. Furthermore, it stands in direct conflict with this Court's decision in *Hoosier Cardinal* and the decisions of other federal courts of appeal.

The Seventh Circuit's decision conflicts with *Hoosier Cardinal* because the court rejected the limitations period which concededly applies under Illinois law without finding that the state law was inconsistent with national labor policy or other federal interests. Moreover, the Seventh Circuit's creation of a novel and unsound federal policy conflicts with the decisions of other courts of appeal and is not supported by ERISA or its legislative history. Indeed, the application of a ten year period for written contracts to this action has no basis in either federal or state law and, accordingly, constitutes impermissible judicial legislation.

Finally, by applying a limitations period for written contracts to a claim based upon a collective bargaining agreement, the Seventh Circuit ignores a basic holding of *Hoosier Cardinal* itself, that such claims are controlled by the limitations period for contracts which are not exclusively in writing.

A. The Seventh Circuit Misconstrued The Meaning And Substance Of Federal Policy Under ERISA And § 301.

1. The Seventh Circuit Improperly Rejected The Applicable Limitations Period Under State Law Without Finding That It Was Contrary To Federal Policy.

In *Hoosier Cardinal*, this Court held that "the timeliness of a § 301 suit . . . is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." 383 U.S. at 704-05. The Court explained that:

> [T]he characterization of [an] action for the purpose of selecting the appropriate state limitations provision is ultimately a question of federal law. But, there is no reason to reject the characterization that state law would impose unless that characterization is unreasonable or otherwise inconsistent with national labor policy.

383 U.S. at 706 (citation omitted).

Under Illinois law, the five year statute of limitations for actions on unwritten contracts would apply to respondents' claims here. Ill. Ann. Stat. ch. 110, ¶ 13-205 (Smith-Hurd 1984). It is well-established that:

> A contract cannot be said to be in writing unless the parties thereto, as well as the terms and provisions thereof, can be ascertained from the instrument itself. If the party to a written contract is not named therein, the contract is defective as containing only part of the agreement.

Pratl v. Hawthorn-Mellody Farms Dairy, Inc., 53 Ill. App. 3d 344, 368 N.E.2d 767, 770 (1st Dist. 1977). Thus, under Illinois law, as in *Hoosier Cardinal*, actions for breach of a collective bargaining agreement are characterized as claims based on unwritten contracts because "parol proof must be resorted to, in order to show with whom the bargain was made." *Id.*; *see also Merk v. Jewel Food Stores*, 641 F. Supp. 1024, 1036 (N.D. Ill. 1986), *aff'd*, 848 F.2d 761 (7th Cir.), *cert. denied*, 109 S. Ct. 393 (1988); *Brown v. Trans-*

america Freight Lines, 72 L.R.R.M. 2678, 2679 (N.D. Ill. 1969).

Similarly, where an action is based on alter ego theory, Illinois law characterizes the claim as one based upon an unwritten contract, and applies the five year limitations period. *Baird & Warner, Inc. v. Addison Indus. Park, Inc.*, 70 Ill. App. 3d 59, 387 N.E.2d 831, 843-44 (1st Dist. 1979).[16]

The Seventh Circuit acknowledged that, under Illinois law, the five year statute applied to this action, but nevertheless chose to reject that law. Instead, it borrowed the Illinois ten year statute for actions based on contracts exclusively in writing. Ill. Ann. Stat. ch. 110, ¶ 13-206 (Smith-Hurd 1984). It reached this result without expressly finding that Illinois law is "unreasonable or otherwise inconsistent with national labor policy," the test articulated in *Hoosier Cardinal*. 383 U.S. at 706.

No such finding could be made. Manifestly, Illinois law does not discriminate against federal interests. Contrast *Trustees of Wyo. Laborers Health and Welfare Plan v. Morgen & Oswood Constr. Co.*, 850 F.2d 613 (10th Cir. 1988) (rejecting Wyoming's two year limitations period for actions based on a federal statute where an eight year period was permitted for analogous state actions). To the contrary, as shown below, Illinois law comports in every respect with federal labor policy under ERISA and § 301.

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[16] The *Baird & Warner* court stated:

> [E]ven if the complaint were sufficient to state a cause of action in contract, the ten year statute applicable to written contracts would not be applicable. Neither Ruud nor Bliss [the alleged alter egos] were parties to the contract; Baird could only seek to hold them liable in contract by producing parol evidence showing that because of their relationship to Addison, they should be held liable as if they were parties to the contract. But where a person is not named in the written contract and parol evidence is necessary to show the existence of the contractual relationship, the contract is unwritten insofar as that person is concerned and the limitations statute relating to written contracts is not applicable.

Baird & Warner, 387 N.E.2d at 843-44. The same result applies here because Envirodyne was not named in the collective bargaining agreement, and parol evidence relating to its relationship with the bankrupt subsidiaries is required to hold Envirodyne liable.

2. The Seventh Circuit's Analysis Of Federal Policy Conflicts With ERISA, Its Legislative History, *Hoosier Cardinal* And Other Federal Appellate Court Decisions.

Even assuming that the Seventh Circuit implicitly made the findings required by *Hoosier Cardinal*, it misapplied federal policy. The Seventh Circuit asserted that application of Illinois' shorter, five year statute "would surely yield a result anomalous with the legislative history and purpose of ERISA." (30a). Therefore, it concluded that "as a matter of federal policy the longer statute of limitations should apply." (29a).

There is no such federal policy. Despite its conclusory invocation of ERISA's legislative history, the Seventh Circuit offered no authority for its view that the longest potentially applicable statute should be borrowed. Indeed, no policy expressed in ERISA or its legislative history requires a limitations period as long as ten years.

To the contrary, the statute and legislative history show that a five year period is not repugnant to ERISA. First, ERISA itself uniformly provides for a three year and six year limitations period for every claim covered by an express period. ERISA §§ 502, 4003(e)(6), 4003(f)(5), 4070 and 4301; 29 U.S.C. §§ 1113, 1303(e)(6), 1303(f)(5), 1370 and 1451. Second, in enacting ERISA, Congress rejected a five year limitations period, contained in the Senate bill, and substituted the shorter three year period under § 413, 29 U.S.C. § 1113. H.R. 4200, 93d Cong., 1st Sess. § 698 (1973), *reprinted in* 2 (pt. 1) Employee Retirement Income Security Act of 1974 Legislative History 2102 (1976). Finally, in the Judicial Improvements Act of 1990, Congress adopted a four year limitations period for all statutes subsequently enacted which do not contain a specific limitations period. 28 U.S.C. § 1658. Accordingly, it is difficult to fathom why application of a five year statute of limitations under ERISA's statutory scheme would be "anomalous" as the Seventh Circuit suggests.

Furthermore, the Seventh Circuit's decision conflicts with *Hoosier Cardinal.* That decision under § 301 expressly approved the shorter limitations period governing oral contracts to serve the goal of federal labor policy to achieve a "relatively rapid disposition of labor disputes." 383 U.S. at 707. This Court rejected the union's argument that application of a six year period applicable to oral contracts was repugnant to federal labor policy and that the longer limitations period for written contracts should be applied.

Consistent with *Hoosier Cardinal* but in conflict with the Seventh Circuit, some courts of appeal similarly have selected shorter limitations periods, and rejected potentially applicable longer periods, in suits under ERISA § 502. *See*, *e.g.*, *Fogerty v. Metropolitan Life Ins. Co.*, 850 F.2d 430, 432 (8th Cir. 1988) (five year statute for breach of contract applicable under ERISA; ten year statute for written contract for payment of money inapplicable); *Vernau v. Vic's Mkt., Inc.*, 896 F.2d 43, 45 (3d Cir. 1990), *Byrnes v. DeBolt Transfer, Inc.*, 741 F.2d 620, 625 (3d Cir. 1984) and *Teamsters Pension Trust Fund v. John Tinney Delivery Serv. Inc.*, 732 F.2d 319, 322-23 (3d Cir. 1984) (each applying three year state statute under § 301 and ERISA; six year statute inapplicable).

Moreover, the Seventh Circuit's implicit conclusion, that the five year limitations period under Illinois law is inadequate as a matter of federal policy, conflicts with the decisions of four other Circuits.[17] Still other Circuits have expressly approved a six year state limitations period as being fully consistent with federal policy under ERISA.[18] Thus, even if the Seventh Circuit correctly framed the issue as mandated by *Hoosier Cardinal*, it misapplied federal policy as reflected in the decisions of other Circuits and *Hoosier Cardinal* itself.

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[17] *See Fogerty*, *supra* (five year statute applicable under ERISA); *Vernau*, *supra*, *Byrnes*, *supra*, and *John Tinney Delivery Serv.*, *supra* (three year statute applicable under ERISA); *Connors v. Hallmark & Sons Coal Co.*, 935 F.2d 336 (D.C. Cir. 1991) (applying three year statute under § 301 and ERISA); *Dameron v. Sinai Hosp. of Baltimore, Inc.*, 815 F.2d 975, 981-82 (4th Cir. 1987) (applying three year statute under ERISA).

Furthermore, the Seventh Circuit's decision is illogical. It asserted that the longest imaginable limitations period should apply because pensions accrue and are paid over many years, and ERISA was passed for the purpose of protecting benefits. (29-30a). However, these considerations cannot justify a nine year delay in asserting a known claim.[19] That an employee's pension accrues over many years does not affect an individual's ability to enforce the employer's pension obligation within a reasonable time after the cause of action is known. Indeed, respondents here promptly asserted claims for the same benefits against Navistar.

In short, the Seventh Circuit's version of ERISA policy is ipse dixit, unsupported by reference to the statute itself or its legislative history. In "borrowing" a state limitations period which would not apply under state law, the Seventh Circuit engaged in unfettered legislation, following neither Congressional intent nor the mandate of a state legislature. *See Lampf, Pleva*, 59 U.S.L.W. at 4690 n.8 ("we find no support in our cases for the practice of borrowing only a portion of an express statute of limitations. Indeed, such a practice comes close to the type of judicial policy making that our borrowing doctrine was intended to avoid").

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[18] *See, Hawaii Carpenters Trust Funds v. Waiola Carpenter Shop, Inc.*, 823 F.2d 289, 297-98 (9th Cir. 1987); *Biros v. Spalding-Evenflo Co.*, 934 F.2d 740 (6th Cir. 1991); *Central States Pension Fund v. Kraftco, Inc.*, 799 F.2d 1098 (6th Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987); *Miles v. New York State Teamsters Conference Pension and Retirement Fund*, 698 F.2d 593 (2d Cir. 1983).

[19] Moreover, as noted *supra*, many of the benefits sought in this case are not pension benefits, as the Seventh Circuit assumed.

B. The Seventh Circuit's Application Of The Written Contract Limitation Period To Claims For Collectively Bargained Employee Benefits Violates The Holding Of *Hoosier Cardinal.*

In selecting the appropriate statute of limitations under § 301, *Hoosier Cardinal* characterized a claim for vacation pay under a written collective bargaining contract as "one not exclusively based upon a written contract" and applied Indiana's six year limitations period for breach of an oral contract. 383 U.S. at 706-07. The Court applied this period because the action was "based partly upon the written collective bargaining contract and partly upon the oral employment contract each employee had made." *Id.* at 699. As the Court explained:

> Proof of the breach and measure of damages, however, both depend upon proof of the existence and duration of separate employment contracts between the employer and each of the aggrieved employees. Hence, this § 301 suit may fairly be characterized as one not exclusively based upon a written contract. *Id.*

Id. at 706. Thus, it concluded that "we cannot agree that federal law requires that this action be regarded as exclusively based upon a written contract." *Id.*

The Seventh Circuit's decision stands in direct conflict with *Hoosier Cardinal* by holding that:

> Despite the fact that some of the plaintiffs' claims are based on the collective bargaining agreement and are brought under the LMRA, there is no basis in federal law for characterizing their claims as an oral contract for purposes of the statute of limitations.

(30a). On the contrary, *Hoosier Cardinal* requires that respondents' § 301 claim be characterized as an action based upon an oral contract.[20] As shown in Point II, the same result applies to the parallel ERISA § 502 claim.

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[20] There can be no doubt that, if *Lampf Pleva* does not compel a contrary result, *Hoosier Cardinal* applies to respondents' § 301 claim. Both cases involve claims for benefits under a written collective bargaining agreement

Indeed, the reasons for applying the oral contract period here are even more compelling than in *Hoosier Cardinal.* Respondents' claims depend upon more than a showing of their years of service and duration of employment which can only be established by their separate employment contracts. Envirodyne was not a signatory to the collective bargaining agreement. Thus, respondents must also show that Envirodyne was the employer under an alter ego theory. Even under the Seventh Circuit's own decision, it is clear that the evidence required to support an alter ego claim goes far beyond that required to establish a written contract. (25a).

Under these circumstances, as the Seventh Circuit recognized, Illinois courts apply the limitations period for oral contracts. *Baird & Warner, Inc.*, quoted at fn. 16 *supra.* However, the Seventh Circuit did not consider the reasons why Illinois applies the shorter limitations period to an alter ego case. The Seventh Circuit noted that written contract limitations periods tend to be longer because proof of the contract terms is presumably documented and, therefore, more reliable. But the court completely failed to consider the import of this policy consideration in an alter ego case where the plaintiff must show that the documented relationships ought to be set aside.[21] The problems of proof which caused

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pursuant to § 301. Indeed, respondents here seek to recover vacation benefits as did the plaintiffs in *Hoosier Cardinal.* Both cases involve state statutory schemes which include separate statutes for breach of written contracts and contracts that are not exclusively in writing. 383 U.S. at 705; Ill. Ann. Stat. ch. 110. ¶¶ 13-205, 13-206 (Smith-Hurd, 1984). And, although respondents here seek additional benefits such as enhanced pension payments, that fact does not provide a valid basis for application of the ten year period of limitation for written contracts. Entitlement to the pension, vacation, medical and other benefits they seek requires proof of the existence and duration of separate employment contracts. 383 U.S. at 707.

[21] The Seventh Circuit even mistakenly concluded that a written contract limitations period would apply because "presumably, the pension plan in this case is at least written in part." (29a). This standard reverses the approach taken by Illinois law, *Hoosier Cardinal* and a host of other cases which hold that a contract which is not *exclusively* in writing is deemed to be an oral contract. *See* cases cited in Part III.A.1, *supra*, pp. 23-25.

the Illinois courts to adopt the shorter limitations period for oral contracts in alter ego cases are manifestly present here. *Baird & Warner, Inc.*, *supra*. And it is widely recognized that tort claims, such as the fraud or misrepresentation which plaintiffs must prove here, should be subject to shorter limitations periods than claims based solely upon written contracts. *See Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617 (1987); *Wilson v. Garcia*, 471 U.S. 261 (1985).

In an increasingly fertile field of litigation, the Seventh Circuit's mistaken creation of federal policy, at odds with decisions of this Court in *Hoosier Cardinal* and *Lampf, Pleva*, and the decisions of several other Circuits, threatens to cause confusion and forum shopping.

CONCLUSION

For the foregoing reasons, the requested Writ of Certiorari should issue.

Dated: August 15, 1991

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APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

◆

Argued Oct. 26, 1990

Decided May 17, 1991

No. 90-1233

◆

FRANK LUMPKIN, *et al.*,

Plaintiffs-Appellants,

—v.—

ENVIRODYNE INDUSTRIES, INC.,

Defendant-Appellee.

◆

Before:

BAUER, *Chief Judge*, and
CUMMINGS and RIPPLE, *Circuit Judges.*

◆

CUMMINGS, *Circuit Judge.*

I. Background

This case requires us to untangle the legal positions of parties disputing whether former employees of the Wisconsin Steel Division ("Division") should be awarded more than $40 million in lost pension benefits that they earned from 1977-1980. The litigation before us represents but one chapter in a complex cycle of litigation stemming from the sale of a steel plant in 1977.[1] The plaintiff class appeals Judge Moran's grant of Envirodyne's motion to dismiss their case for vested benefits earned between 1977 and 1980. Because this dismissal was granted on the basis of a failure to state a claim, Fed.R.Civ.P. 12(b)(6), we construe the facts on appeal in a light most favorable to the plaintiffs.

International Harvester (its name has since changed to "Navistar" and it will be referred to as such) owned the Division, which included a steel plant located in Chicago, Illinois, the steel mill's inventory and receivables, two iron-ore mines, and a coal mine, for 75 years. In 1977, Navistar concluded that the plant was no longer profitable for the corporation and began to look for a buyer. However, the plant did not come unencumbered. Any prospective buyer of the Division would not only receive a steel plant but also would assume responsibility for over $62 million in unfunded pension liabilities, a considerable amount for any prospective buyer to absorb.

In 1977, Navistar found an unlikely buyer, however, in Envirodyne Industries, Inc., a small engineering company located in Oak Brook, Illinois, interested in purchasing the Division in order to test new environmental technologies. Envirodyne also viewed the Division as serving certain short-term pressing financial needs. Navistar's sale of the Division to Envirodyne was not a straight sale, however, and ultimately the deal took the form of a transfer of title by Navistar to two wholly-owned subsidiaries of Envirodyne, set up specifically for the purpose of assuming control over the Division. The two subsidiaries were named EDC Holding Company ("EDC"), a subsidiary of Envirodyne, and WSC Corporation ("WSC"), in turn a subsidiary of EDC. Under the terms of the sale by Navistar, the two subsidiaries assumed responsibility for the substantial unfunded pension fund of the Division.

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[1] Still pending before this Court are appeals arising out of Judge Moran's decision in *Pension Ben. Guaranty Corp. v. Envirodyne Industries, Inc.*, 10 EBC 1458 (N.D.Ill.1988) that Navistar was held to be liable to the plaintiffs for the employees' pension benefits only to the date of sale. This Court held recently that Navistar was not liable in fraud to EDC. *In re EDC, Inc.*, 930 F.2d 1275 (7th Cir.1991).

This arrangement endured from 1977 until 1980, when EDC and WSC filed for bankruptcy under Chapter 11 of the Bankruptcy Code and the Division closed. The bankruptcy filing was precipitated by Navistar, which foreclosed on the mortgages extended to EDC and WSC as part of the sale of the Wisconsin Steel Division.[2]

The bankruptcy spawned a flurry of litigation, precipitated by the claims brought by the creditors of EDC and WSC for the debts due to them. In 1980, the logical defendant was not the parent of the two subsidiaries, Envirodyne, which had yet to grow into the Fortune 500 company which it has now become, but Navistar, for it was Navistar that initiated and leveraged the sale of the Division in the first place to Envirodyne, a buyer that was alleged to be undercapitalized and incapable of assuming sole responsibility for the huge pension fund. Indeed, Lehman Brothers, which had prepared a report reviewing the terms of the ultimate sale of the Division by Navistar to EDC and WSC, stated unequivocally that the deal smelled of fraud, and called for Envirodyne to take responsibility for the pension benefits as opposed to the two subsidiaries, set up presumably to insulate the parent from liability for the pension fund.

A series of claims was subsequently brought against Navistar. First, there were the claims brought by the creditors of EDC and WSC for the debts of the two subsidiaries. Next were two sets of pension claims for the pension monies due to the former employees of the Division for benefits from the period both before and after the sale of the Division. Under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1081 *et seq.*, the employees filed claims for vested pension benefits with the Pension Benefit Guaranty Corporation ("PBGC"), which acknowledged that the claims were insured and proceeded to assume fiscal responsibility for a portion of the claims. PBGC in turn filed suit against Navistar for indemnification for the pension claims it had satisfied. The remaining claim against Navistar was filed by Frank Lumpkin *et al.*, the class of former employees of the Division, who filed claims for the pension and contractual obligations not guaranteed by the PBGC and running from 1977 through 1980.

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[2] EDC and WSC could not afford to pay for the Wisconsin Steel Division at once, so that Navistar extended credit to the purchasers in the form of mortgages.

These three lawsuits were subsequently consolidated by Chief Judge Moran into what became known as *Lumpkin I.* Before trial of these consolidated claims, Navistar settled with the various parties for $14.8 million in February 1988. Contained in the Settlement Agreement was a release, which has since become crucial to the disposition of the instant case. The release provided that "[t]he Settlement Agreement settles all claims by or on behalf of members of the Settlement Class in the *Lumpkin* class action and in the *WSC* bankruptcy proceedings." The Definitions section of the Settlement Agreement identified the parties included in the Settlement Agreement. They included Navistar, the Lumpkin Class, EDC and WSC. Significantly, however, Envirodyne Industries, Inc. was not named in the Settlement Agreement, and the *Lumpkin* plaintiffs' present claims hinge on a finding that Envirodyne was not released by the terms of the Settlement Agreement. This is a point to which we will return.

One important fact worth noting at the outset is that when the settling parties presented the Settlement Agreement in district court for a fairness hearing by Judge Moran, counsel to the *Lumpkin* class pronounced in open court that the plaintiffs did not intend by the release to absolve Envirodyne of potential liabilities. Plaintiffs' counsel suggested also that it wished to reserve its rights against Envirodyne even though EDC and WSC were named explicitly in the release. At the time of this statement, Judge Moran did not make any explicit ruling on the viability of future claims by plaintiffs against Envirodyne.

Following the Settlement Agreement, the other claims outside the Settlement went to trial. In *Pension Ben. Guaranty Corp. v. Envirodyne Industries, Inc.*, Judge Moran held that Navistar was liable to the PBGC for the employees' pension benefits to the date of the 1977 sale and not after. 10 EBC

1458 (N.D.Ill.1988). The district judge determined further that Navistar had no liability to the debtors-in-possession, EDC and WSC. The decision rejected Envirodyne's claim that Navistar was liable to it for fraud, recognizing that Envirodyne had the necessary information available and was not an "unsophisticated old person relying on some glib-tongued huckster." 10 EBC at 1462. This Court recently affirmed Judge Moran's decision that Navistar was not liable in fraud to EDC. *In re EDC, Inc.*, 930 F.2d 1275 (7th Cir.1991). In that decision, the Court, alluding to cases like this one, acknowledged that "venturesome creditors might try . . . to pierce the corporate veil and reach Envirodyne's assets and might even succeed." *In re EDC, Inc.*, 930 F.2d at 1279. Thus at the time the present litigation began, the plaintiffs had entered into the 1988 Settlement Agreement with Navistar, whose pension liability had been limited as a matter of law to the 1977 sale by Judge Moran's decision in *Pension Ben. Guaranty Corp. v. Envirodyne Industries, Inc.* See note 1 *supra.*

Remaining unrecovered as a result of the proceedings were the pension benefits earned by the plaintiff class from the time that the Division was sold in 1977 to the time that it closed three years later in 1980. In an effort to recover these benefits, the plaintiff class successfully petitioned for recertification for this class action suit against Envirodyne Industries, Inc., the parent corporation of the defunct subsidiaries EDC and WSC. The plaintiffs brought this class action suit under ERISA Section 502 (29 U.S.C. § 1132) and the Labor Management Relations Act ("LMRA") Section 301 (29 U.S.C. § 185) for uninsured pension and contract benefits for the period from the date of sale in 1977 to the date of closure in 1980. The basis for their claim against the parent corporation was that Envirodyne, as parent of EDC and WSC, was liable for the lost benefits under a corporate law *alter ego* theory. In other words, plaintiffs asserted that they should be permitted to disregard the corporate form that would otherwise insulate Envirodyne Industries from plaintiffs' pension claims against EDC and WSC.

As mentioned earlier, Judge Moran, in a memorandum order, certified a plaintiff class identical to the class in *Lumpkin I*, but the plaintiffs' claims did not advance much further because Judge Moran in the same order proceeded to grant Envirodyne's motion to dismiss. The district judge based his decision on several grounds. First and foremost, he concluded that Envirodyne was released under the terms of the Settlement Agreement. Although the Settlement Agreement did not name Envirodyne Industries, there were, in Judge Moran's view, compelling reasons for insulating Envirodyne from liability under the terms of the release. Citing the specific language of the release, he recognized that the Settlement Agreement contained the statement that "all claims" in both the class action and the bankruptcy proceeding were released. According to this reasoning, if *alter ego* claims could have been asserted against Envirodyne in the bankruptcy proceeding, then claims against Envirodyne would be barred under the plain terms of the settlement release. See District Court Memorandum and Order of November 7, 1989, at 9-10 (Plaintiffs' App. A-10–A-11).

Additionally, Judge Moran found a more indirect means of concluding that the Settlement Agreement precluded the plaintiffs' suit against Envirodyne. Since Navistar entered into the Settlement Agreement on the condition that it would be forever released for any further liabilities in the dispute, subsequent litigation in this matter must be reviewed with an eye to its possible effect on the validity of the release. If the suit filed by the *Lumpkin* plaintiffs against Envirodyne could expose Navistar to further liabilities, such a suit would violate the terms of the Settlement Agreement. Judge Moran recognized that the results of the 1988 trial in *Pension Ben. Guaranty Corp. v. Envirodyne Industries, Inc.* made it highly unlikely that Envirodyne, if held liable in a suit by the *Lumpkin* class, could successfully obtain contribution from Navistar. However, he went on to say that "when the bargain was struck [in the Settlement Agreement] the trial had not yet commenced, and the interested parties could not be certain of the outcome." Memorandum and Order of November 7, 1989, at 10 (Plaintiffs' App. A-11). Because he believed the Settlement Agreement cannot be viewed in hindsight, Judge Moran thought that its terms must be taken to include the possibility that Envirodyne would proceed against Navistar, and that the release specifically foreclosed this possibility. *Id.*

Judge Moran concluded that the release prevented the plaintiff class from bringing suit against Envirodyne, and therefore he did not reach the statute of limitations defense put forward by Envirodyne. As an alternative grounds for dismissal, Envirodyne had claimed that the plaintiffs' class action was time-barred by the Illinois five-year statute of limitations for disputes arising on an oral contract. The plaintiff contends in response that the claims here are properly characterized as controversy over the terms of a written contract, so that the longer ten-year statute of limitations applies. If the latter is true, then the plaintiffs' action is not barred by the statute of limitations.

After Judge Moran granted defendant's motion to dismiss, the plaintiffs filed a timely notice of appeal in this Court.[3] On appeal, the plaintiffs asserted that the motion to dismiss was improvidently granted on several grounds, and claimed that as a matter of law the Settlement Release does not immunize Envirodyne from suit. Because the release is assertedly ambiguous on its face, its proper construction hinges on the outcome of a searching examination of the parties' intent. This appeal comes to us on the granting of a motion to dismiss, with an inadequate record for us to decide the question. Therefore, we remand to the district judge to determine the parties' intent on the basis of a more developed evidentiary record. Although Judge Moran declined to reach the statute of limitations issue in the case, both parties briefed it, and we decide it, because the plaintiffs' claims may go forward on the remand. We hold that the proper statute of limitations under Illinois law for the plaintiffs' action is ten years, since the plaintiffs' claims resemble claims on a written contract. Therefore, their claims are not time-barred.

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[3] When plaintiffs first filed their notice of appeal, this Court questioned whether the appeal was timely. Upon review of plaintiffs' jurisdictional memorandum, filed in response to our order, we conclude that their appeal was timely filed. The limitations period for filing was tolled from the date of the district court's denial of plaintiffs' motion to reconsider the court's grant of the motion to dismiss. Fed.R.App.P. 4(a)(4)(iii). The district court denied plaintiffs' motion to reconsider on January 18, 1990. The plaintiffs filed their notice of appeal on January 30, 1990. Plaintiffs had thirty days to file their notice of appeal so that their appeal was timely.

II. Analysis

A. The Federal Policy Underlying ERISA

Before reviewing the specific legal controversies at issue in the case, it is worthwhile to place this case in perspective. First and foremost, the dispute in this case arose in the shadow of ERISA, the complex, comprehensive federal statute passed by Congress to protect the pension rights of employees. Thus the dispute here arose between one party, the plaintiff employees, whose right to pension benefits has been explicitly protected by Congress in the enactment of a comprehensive legislative scheme, and the defendant, a corporation whose liability for such pension benefits is contested under ERISA and under principles of both contract and corporate law.

Whether plaintiffs' claims under ERISA and Section 301 of the LMRA are meritorious is not for us to decide. Our task is limited to a review of Judge Moran's decision to grant the defendant's motion to dismiss. Clearly the plaintiffs have stated a cause of action under both federal statutes. First of all, Section 301 of the LMRA authorizes district courts to decide suits for violation of contracts between an employer and a labor organization, and it is uncontested that plaintiffs were representing all former employees belonging to the Progressive Steel Workers Union or other bargaining units.[4] In turn, ERISA Section 502 provides for civil enforcement, permitting pension plan beneficiaries to bring a private action to recover benefits due to them under the terms of a benefit plan. Specifically, ERISA provides that "[a]n employee benefit plan may sue or be sued under this title as an entity." ERISA Section 502(d)(1), codified at 29 U.S.C. § 1132(d)(1).

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[4] Envirodyne does not challenge the jurisdiction of the district court under the LMRA or ERISA (Defendant's Br. at 1).

The plaintiff class cites other sections of ERISA in support of its claims. Section 203 sets forth the minimum vesting standards for pension benefits. ERISA requires that "[e]ach pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon attainment of normal retirement age." ERISA Section 203(a), codified at 29 U.S.C. § 1053. Section 204(g) protects accrued benefits from being decreased by amendments to the specific pension plan. ERISA Section 204(g)(1), codified at 29 U.S.C. § 1054. Finally, the plaintiffs refer in their appeal to Section 206(d)(1), ERISA's anti-alienation provision. This section, heavily relied upon by the plaintiffs in their brief and at oral argument, requires that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." ERISA Section 206(d)(1), codified at 29 U.S.C. § 1056(d)(1).

The plaintiffs place particular weight on this last section, the anti-alienation provision, which they believe protects the employees of the Division from either expressly or impliedly waiving their right to pension benefits by entering into the Settlement Agreement. ERISA's anti-alienation provision assertedly protects them from such an unknowing waiver of pension benefits, for the release, if it includes Envirodyne, would operate to deny the plaintiffs their pension benefits for the period after the Division was sold to the subsidiaries of Envirodyne.

Plaintiffs' analysis begs the question. The issue is not whether the anti-alienation provision contained in ERISA prevents plaintiffs from waiving their pension benefits. It clearly does not. Rather, the question here is whether the plaintiffs released their claims against Envirodyne by settling their claims with EDC and WSC. Interpreting a settlement agreement presents a question of contract law, in which "[t]he primary object in construing a contract is to give effect to the intention of the parties." *Air Line Stewards and Stewardesses Ass'n v. American Airlines, Inc.*, 763 F.2d 875, 877-878 (7th Cir. 1985), certiorari denied, 473 U.S. 1059, citing *Schek v. Chicago Transit Auth.*, 42 Ill.2d 362, 364, 247 N.E.2d 886, 888 (1969). Absent clear language in the Settlement Agreement to resolve a dispute over the proper construction of a contract, a court may go outside the four corners of the contract and consider extrinsic and parol evidence presented by the parties. This requires the district court to then conduct fact-finding so that it may resolve the ambiguities inherent in the contract. *LaSalle Nat'l Bank v. Service Merchandise Co.*, 827 F.2d 74, 78 (7th Cir. 1987).

The former employees of the Division, who comprise the plaintiff class, have no other recourse to recover the pension and welfare benefits due to them from their service to the Division from 1977 to 1980. The anti-alienation provision, while clearly manifesting Congress's intent to protect workers from unknowingly signing away their vested pension benefits, does not impose a bar on settlement agreements wherein pension claims are knowingly and intentionally resolved by employees. *Fair v. International Flavors & Fragrances, Inc.*, 905 F.2d 1114, 1115-1116 (7th Cir. 1990); *Nichol v. Pullman Standard, Inc.*, 889 F.2d 115, 121 (7th Cir. 1989). To apply the anti-alienation provision in this case would establish the untenable rule that ERISA prevents plaintiffs from ever entering into a settlement in a dispute over lost pension benefits.

The plaintiffs' position, favoring a rigid application of the anti-alienation provision, is not defensible. They cite the Supreme Court's recent decision in *Guidry v. Sheet Metal Workers Pension Fund*, 493 U.S. 365, 110 S.Ct. 680, 107 L.Ed.2d 782, for the proposition that "there is *no* exception to this [anti-alienation] policy *ever*." (Plaintiffs' Br. at 19 (emphasis in original)). If this were true, then the Settlement Agreement, in which the plaintiffs plainly recovered a portion of their pension claims, would be invalid so long as any amount of unrecovered pension benefits remained at issue. This no-exception rule, if applied here, would render a Settlement Agreement valid only on the continued approval of the plaintiffs, a result that is surely inconsistent with the whole purpose of encouraging settlement agreements to resolve legal claims.

While the anti-alienation provision of ERISA does impose a firm rule preventing pensioners from alienating their benefits, this case is simply outside the realm of the provision. The legal question in this case revolves not around the proper construction of a specific provision in ERISA, but rather around legal questions of corporate and contract law. As the defendant rightly points out, the anti-alienation provision protects individuals who pledge their pension benefits as collateral or squander their benefits before retirement (Defendant's Br. at 20).[5] The Settlement Agreement in this case does not fall into either category. Instead, the question on appeal is whether the employees can recover pension benefits earned between 1977 and 1980 from Envirodyne under the theory that the release in the Settlement Agreement does not extend to Envirodyne and that Envirodyne can be held liable for the pension and welfare benefits under an *alter ego* theory.

B. Application of the Settlement Release to Envirodyne

1. *The intent of the parties*

Turning to the release itself, the question to be resolved concerns the proper interpretation of a contract entered into by informed parties represented by counsel. Should the release be read broadly to include Envirodyne, even though Envirodyne is nowhere named in the Settlement Agreement? In construing the terms of a contract, a court is required to engage in a two-fold inquiry. First, it is necessary to look to the plain language of the provision at issue. Reviewing Illinois law, this Court has noted that "[t]he starting point must be the contract itself. If the language of the contract unambiguously provides an answer to the question at hand, the inquiry is over." *LaSalle Nat'l Bank v. Service Merchandise Co.*, 827 F.2d 74, 78 (7th Cir. 1987). If the plain language of the contract is ambiguous, then "the court must go on to declare [the contract's] meaning." *Id.* If the court finds that a contract is ambiguous and that extrinsic evidence is undisputed, then the interpretation of the contract remains a question of law for the court to decide. *City of Clinton v. Moffitt*, 812 F.2d 341, 344 (7th Cir. 1987). However, if the parties dispute the extrinsic evidence on an ambiguous contract, then a fact-finder must be called upon to determine the intent of the parties. *Id.*; *LaSalle Nat'l Bank*, 827 F.2d at 78; *Air Line Stewards and Stewardesses Ass'n v. American Airlines, Inc.*, 763 F.2d 875, 878 (7th Cir. 1985).[6]

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[5] As support for their reading of the anti-alienation provision, the defendant analogizes to an identical provision of the Internal Revenue Code, Section 401(a)(13), which states that the I.R.C. anti-alienation provision applies to arrangements where benefits are "anticipated, assigned (either at law or equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process." Treasury Reg.Sec. 1.401(a)–13(b).

We hold that as a matter of law the release is ambiguous on its face. Envirodyne is not identified by name as a settling party, and the release, while it names WSC and EDC, nowhere states that naming the subsidiaries operates to release the parent corporation.

Judge Moran declined to examine fully the parties' intent, believing instead that "[t]he issue is not . . . their subjective intent but the necessary implications of the bargain which they made." District Court Memorandum and Order of November 7, 1989, at 9 (Plaintiffs' App. A-10). In effect the district court tacitly admitted by this statement that the plain language of the release is insufficient to determine Envirodyne's status. However, to draw any conclusions concerning the necessary implications of this bargain requires going beyond the language contained in the writing itself. Therefore it is necessary to define the parties' intent by looking to extrinsic and parol evidence. The record on appeal is insufficient for us to ascertain the parties' intent. This inquiry must properly be carried out by the district court judge, who has the parties and the evidence before him. In *Air Line Stewards and Stewardesses*, this Court decided that although the settlement agreement in a sex discrimination case was ambiguous on its face, it did not provide for retroactive retirement credit for employees upon consideration of extrinsic evidence. The Court declined to remand for findings of fact, concluding that the issues in the case had been fully briefed, and the Court had before it all of the relevant extrinsic evidence. 763 F.2d at 879. We cannot do the same here, because the record is incomplete. The district judge made no findings of fact, and there may well be extrinsic evidence outside the record on appeal that bears upon the proper determination of the parties' intent.

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[6] This approach has been questioned in *Riley v. American Family Mut. Ins. Co.*, 881 F.2d 368 (7th Cir. 1989), where the Court recognized that either federal common law or state contract law might govern the release of rights under Title VII or other similar federal statutes. *Id.* at 371. The Court in *Riley* concluded that where plaintiffs execute a settlement release on the advice of counsel and absent fraud or duress, they may release their rights under Title VII. *Id.* at 373-374. The critical difference, however, between *Riley* and the case at hand is that the district judge in *Riley* made an explicit finding that the release was unambiguous. See also *Constant v. Continental Tel. Co.*, 745 F Supp. 1374 (C.D.Ill. 1990) (same analysis applied to Age Discrimination in Employment Act). Here Judge Moran made no specific finding that the release contained in the Settlement Agreement was unambiguous.

Although this Court cannot make factual findings concerning the intent of the parties from this record, we can examine the legal principles that will apply to the district court's evidentiary inquiry. First, it must be determined under applicable law whether, as plaintiffs contend, a specific intent to release is required for Envirodyne to be released from further liabilities pursuant to the Settlement Agreement. Second, this Court must decide whether Envirodyne is specifically included in the release by virtue of the fact that it is the parent corporation of two corporate entities named explicitly in the release, EDC and WSC.

Envirodyne advances two arguments in support of its position that the Settlement Agreement released it from the instant lawsuit. The first is what plaintiffs call the "implied" or "general" release argument. It concerns the proper scope to be given to a release as a matter of law. The plain language of the release nowhere mentions Envirodyne. In order to prevail, the defendant must demonstrate that such a requirement is unnecessary and that, as a matter of law, a generally worded release operates to release potential defendants from all foreseeable claims. This was the ancient common law rule under which "a release extinguished the cause of action to which it related," and a release of one party released all others jointly liable, without regard to the intent of the parties. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 343, 91 S.Ct. 795, 808, 28 L.Ed.2d 77. Unfortunately for Envirodyne, in the very same opinion, the Supreme Court put that rule to rest, rejecting it in favor of the rule set forth in the Second Restatement of Torts: "The straightforward rule is that a party releases only those other parties whom he intends to release." *Id.* at 347, 91 S.Ct. at 810.

The plaintiffs in this case assert that they did not intend to release Envirodyne by entering into the Settlement Agreement. Indeed, at the fairness hearing the plaintiffs' attorney announced to the district court that plaintiffs were reserving their rights against Envirodyne. Before we conclude, however, that the rule in Zenith governs this case, a more searching analysis is required.

In a case involving a federal cause of action, the extent to which a release binds parties unnamed is an issue governed by federal law. *Locafrance U.S. Corp. v. Intermodal Systems Leasing, Inc.*, 558 F.2d 1113 (2d Cir. 1977) (Oakes, J.). However, because there is no general federal common law, conflicting interpretations of this mandate have arisen among the circuits. See *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 101 S.Ct. 1571, 67 L.Ed.2d 750. The Second Circuit in *Locafrance* favored a uniform federal rule—namely, that a release of a joint tortfeasor or coconspirator does not release others "unless the party signing the release intended the others to be released." *Locafrance*, 558 F.2d at 1115.

The Ninth Circuit disagrees. In *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454 (9th Cir. 1986), Judge Norris readily acknowledged that the scope of the validity of a release of a federal cause of action is governed by federal law. *Mardan*, 804 F.2d at 1457. However, the court believed that the governing federal law does not require the courts to establish a uniform federal rule. Rather, the federal law in this area arises through the incorporation of "state rules of decision," which "furnish an appropriate and convenient measure of the governing federal law." *Id.* at 1458. See *Burks v. Lasker*, 441 U.S. 471, 486, 99 S.Ct. 1831, 1841, 60 L.Ed.2d 404 (in stockholders' derivative suit brought under federal law, state law should be applied).

Judge Norris' point in *Mardan* is well-taken here. In fashioning a federal rule of decision, courts must often look to the applicable state law for guidance in areas where Congress has not provided for a uniform federal rule. Therefore in *Mardan*, where the purchaser of a musical instrument plant brought an action against the vendor under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") (42 U.S.C. §§ 9601-9657 (1982)), the court applied New York law, holding that the action was barred by that state's law of release.[7] *Id.* at 1461.

The *Mardan* rule makes sense, for the alternative presented in *Locafrance* places the job of inventing a uniform federal rule within the discretion of the first federal judges that gets their hands on the issue. This leaves too much to chance. If Congress intended federal courts to be bound by a single standard when a federal cause of action arises, then it could have provided for such a rule for cases where a federal cause of action raises an accompanying question of interpretation of a related legal position.

Turning then to state law, we must examine the law of release in Illinois. In Illinois, the law of release has been reviewed by the courts in the area of tort law as a result of the express provisions contained in the Illinois Contribution Among Joint Tortfeasors Act (Ill.Rev.Stat. ch. 70, para. 302 (1989)), which provides in part (c):

> When a release or covenant not to sue or not to enforce judgment is given in good faith to one or more persons liable in tort arising out of the same injury or the same wrongful death, it does not discharge any of the other tortfeasors from liability . . . unless its terms so provide

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[7] The majority included the appropriate caveat that state law will supply the content of the federal rule so long as the governing state law "does not in any way appear to be aberrant or hostile to federal interests." *Mardan*, 804 F.2d at 1460.

> but it reduces the recovery on any claim against the others to the extent of any amount stated in the release . . . or in amount of the consideration actually paid for it, whichever is greater.

The Illinois Supreme Court has construed the Act as applied to a generally worded release arising out of the settlement of an action for personal injuries. *Alsup v. Firestone Tire & Rubber Co.*, 101 Ill.2d 196, 77 Ill.Dec. 738, 461 N.E.2d 361 (1984). There the injured plaintiffs, who were in one car at the time of the accident, entered into a settlement containing a general release of the driver and his parents, who were in the other car, "and all other persons, firms, and corporations, both known and unknown." *Id.* at 197, 77 Ill.Dec. 738, 461 N.E.2d 361. The release also posed "a complete bar to all claims or suits for injuries or damages of whatsoever nature resulting or to result from said accident." *Id.* at 199, 77 Ill.Dec. 738, 461 N.E.2d 361. Subsequently, after discovering that a defective tire might have precipitated the accident, the plaintiff's administrator filed suit against the tire manufacturer.

On review, the Illinois Supreme Court held that the tire manufacturer was not released, despite the apparent breadth of the settlement language. In its analysis, the state court criticized the common law rule whereby the release of one tortfeasor released all joint tortfeasors, and relied instead upon the Illinois Contribution Among Joint Tortfeasors Act. Recognizing the danger that plaintiffs may "unwitting[ly] discharge . . . joint tortfeasors," *id.* at 201, 77 Ill.Dec. 738, 461 N.E.2d 361, the court declined to release Firestone when it was not named or specifically designated in the release. The 1984 opinion, by the court's own admission, established a new rule of decision under Illinois law:

> We judge that the widespread use of and reliance upon general releases to discharge all tortfeasors, including those not specifically identified in the release, require that our decision here be made prospective in operation. . . . We accordingly hold that this decision will apply

> prospectively to releases from liability executed after the date of the filing of this opinion.

Id. at 202-203, 77 Ill.Dec. 738, 461 N.E.2d 361 (citations omitted). See also *Stewart v. Village of Summit*, 114 Ill.2d 23, 30, 101 Ill.Dec. 862, 865, 499 N.E.2d 450, 453 (1986) ("[T]he public policy of this jurisdiction is that no instrument purporting to terminate the liability of a tortfeasor serves to discharge any other tortfeasor from liability for the same injury unless its terms so provide.").

In this case the plaintiff class has not brought a tort suit, and the district court failed to find the analogy to tort law to be persuasive. But the law to be applied is not the law of tort but the law of release as applied to the proper interpretation of a recorded settlement agreement. The 1988 settlement release entered into by the plaintiffs should be interpreted in light of pervasive legal trends rather than the antiquated common law rule.

Here the release entered into by the plaintiffs was of the same general nature as the settlement release in *Alsup*. By settling with Navistar, the plaintiffs, along with the other settling parties agreed to settle "any and all claims, actions, causes of action, rights or liabilities, including Unknown Claims, by a Settlement Class Member or on behalf of a Settlement Class Member or by anyone claiming through or under a Settlement Class Member by way of subrogation or otherwise, that have been asserted or could have been asserted in the Chapter 11 bankruptcy proceed or of *In re Wisconsin Steel Company*." (Settlement Agreement at 4, reprinted in Plaintiffs' Br. at A-21). This is plainly a general release that purports to resolve all claims, but it nowhere mentions Envirodyne by name. Nor does the release mention that Envirodyne is one of the parties that plaintiffs intend to release.

There are two separate questions concerning the release, and the decisions of the Illinois Supreme Court in Alsup and the Supreme Court's requirement of a specific intent to release in *Zenith* provide the appropriate framework for construing the release in view of its facial ambiguity. This requires the district court to give proper consideration to the extrinsic evidence necessary to define the parties' intent.

2. *Envirodyne's invocation of the alter ego doctrine*

Our above conclusion does not wholly pave the way for plaintiffs' suit against Envirodyne to go forward, for Envirodyne advances another argument in favor of its position. It is what the plaintiffs characterize as the defendant's "express" release argument—that the defendant is released because WSC and EDC are specifically named in the Settlement Agreement and because Envirodyne is the parent corporation of the two subsidiaries, it benefits from the release under an *alter ego* theory.

Envirodyne, in advancing this argument, seeks protection from a doctrine whose purpose is to prevent a corporation that has acted fraudulently or unjustly from protecting itself from liability by shielding itself with the protective mantle of the corporate form. Essentially, defendant's argument is but another way of restating the argument that the release of one party operates to release all others. This time, however, the defendant bases its argument on a principle of corporate law—in short, the defendant has served up a red herring. As we understand its approach to the *alter ego* doctrine, defendant argues that if it is found to be the *alter ego* of the subsidiaries, then its relation to the subsidiary is close enough for Envirodyne to be considered a party to the release.

However, the *alter ego* doctrine, as invoked by Envirodyne, does not work this way. Courts will allow plaintiffs to pierce the corporate veil to impose liability on a defendant who unjustly seeks protection in the corporate form. The *alter ego* doctrine is a sword, not a shield, the basis for a cause of action, not a defense. By asserting that the *alter ego* doctrine applies to its case, Envirodyne essentially inculpates itself by admitting that WSC and EDC are corporate shells and that Envirodyne, the parent corporation, is the real party at interest in the Settlement Agreement. Envirodyne's wish to be recognized as an *alter ego* of the subsidiaries here could return to haunt it when the district court decides whether plaintiffs may pierce the corporate veil. By asserting that it is an *alter ego*, Envirodyne may be barred from stating that it is not an *alter ego* at a later stage of the litigation. In *Goldstein v. Scott*, 108 Ill.App.3d 867, 872, 64 Ill.Dec. 374, 378, 439 N.E.2d 1039, 1043 (1982), the Illinois Appellate Court recognized that a party may not assert that it is the *alter ego* and then, when it is no longer advantageous to do so, deny it. *Goldstein* involved a defendant church corporation, which sued its liability insurer for coverage on a property damage claim. A federal district court held in favor of the church believing it to be the *alter ego* of the uninsured beneficial owner of the property. *Id.* at 871, 64 Ill.Dec. 374, 439 N.E.2d 1039. Subsequently, the church attempted to escape liability for personal injuries caused by the property damage, claiming that it was not the *alter ego* of the property owner. *Id.* at 872, 64 Ill.Dec. 374, 439 N.E.2d 1039. The state appellate court concluded that the church may not assert that it is the *alter ego* and later deny it:

> [The church] having sought the finding that it was [the property owner's] *alter ego* . . . and having obtained the finding it so vigorously sought is judicially estopped from denying in this action that it is the [property owner's] *alter ego*. . . . A party cannot play "fast and loose" . . . or blow "hot and cold" during the course of litigation. When a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter assume a contrary position.

Id. at 872, 64 Ill.Dec. 374, 439 N.E.2d 1039, citing *Finley v. Kesling*, 105 Ill.App.3d 1, 60 Ill.Dec. 874, 433 N.E.2d 1112 (1982).

C. Proper Application of the *Alter Ego* Doctrine

Were we to accept the defendant's view of the *alter ego* doctrine, the Court would be sanctioning the abuse of the corporate form. In this case, the *alter ego* doctrine applies to the plaintiffs' theory of the case, for it is they who have alleged control, fraud and undercapitalization by defendant in order to pierce the corporate veil.

In cases involving claims to pension benefits protected by ERISA, it has been recognized that there is a federal interest supporting disregard of the corporate form to impose liability. ERISA protects workers from their employers' attempts to deny them pension benefits. As the First Circuit made clear in *Alman v. Danin*, 801 F.2d 1 (1st Cir.1986), where it allowed the plaintiffs to press forward with their suit against the incorporators of an underfunded corporation, "ERISA . . . cannot be said to attach great weight to corporate form," *id.* at 3.

In reaching this conclusion, the *Alman* court first examined the proper approach a court should take when it decides whether to disregard the corporate entity where a federal cause of action is asserted. First, the court noted that although "[t]here is no litmus test in the federal courts governing when to disregard corporate form," the Supreme Court has stated that "the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice." *Id.* at 3, quoting *Taylor v. Standard Gas & Electric Co.*, 306 U.S. 307, 322, 59 S.Ct. 543, 550, 83 L.Ed. 669. Moreover, the protection afforded by the corporate form might be undercut by the overriding federal legislative policy reflected in the particular statute providing an aggrieved party with a cause of action.

The underlying congressional policy behind ERISA clearly favors the disregard of the corporate entity in cases where employees are denied their pension benefits. In *Pension Ben. Guaranty Corp. v. Ouimet Corp.*, 711 F.2d 1085 (1983), certiorari denied, 464 U.S. 961, 104 S.Ct. 393, 78 L.Ed.2d 337, the First Circuit pierced the corporate veil to impose liability upon the solvent members of a corporation that had declared bankruptcy. The court emphasized that the congressional intent of ERISA is to hold employers responsible for pension benefits, so that when the corporate form poses a bar to liability, "concerns for corporate separateness are secondary to what we view as the mandate of ERISA." *Id.* at 1093; see also *Pension Ben. Guaranty Corp. v. Anthony Co.*, 537 F.Supp. 1048 (N.D.Ill.1982) (employer and parent were a single employer for purposes of imposing liability for vested, unfunded benefits; parent corporation obligated to make good on deficiency from pension plan termination). Thus under *Ouimet Corp.*, the corporate form chosen by defendant does not necessarily preclude plaintiffs from piercing the corporate veil and suing Envirodyne. If justice would be served and potential fraud nullified then plaintiffs should be able to proceed against the party that has actual control of WSC and EDC.

Conversely, widening the scope of the release so that it applies to Envirodyne would undermine the above-articulated reasons for piercing the corporate veil in the first place. In *Alman*, the court recognized that the corporate veil may be pierced more easily in ERISA cases than in pure contract cases in order to promote the federal policies underlying the statute: "Allowing [the parent] of a marginal [undercapitalized subsidiary] to invoke the corporate shield in circumstances where it is inequitable for them to do so and thereby avoid financial obligations to employee benefit plans, would seem to be precisely the type of conduct Congress wanted to prevent." *Alman*, 801 F.2d at 4.

The Ninth Circuit has previously upheld a district court's decision to disregard the corporate form so that plaintiffs in that case would recover unpaid contributions to their pension plan. *Laborers Clean-Up Contract Admin. Trust Fund v. Uriarte Clean-Up Service, Inc.*, 736 F.2d 516 (9th Cir.1984). The court recognized that the corporate defendant was a dummy corporation set up for the purpose of carrying forth the business of certain individual shareholders. In making this determination, the Ninth Circuit identified three factors: 1) the amount of respect given to the separate identity of the corporation by its shareholders; 2) the fraudulent intent of the incorporators; and 3) the degree of injustice visited on the litigants by respecting the corporate entity. *Id.* at 524. The court found that all three prongs of the test were satisfied, in particular identifying the extent to which the incorporators undercapitalized the corporation so that the corporation was unable to operate as a business or satisfy its debts.

Alman and *Uriarte* thus provide a framework for applying the *alter ego* doctrine to determine whether its underlying purposes have been met. The plaintiffs have yet to prove in court their entitlement to benefits from Envirodyne. If they are able to do so as a matter of law, it will be because they have successfully shown that Envirodyne is the *alter ego* of WSC and EDC so that the corporate form should be disregarded.

There is authority to suggest that the release of a subsidiary does not prevent *alter ego* claims from being brought against the parent. In *Mesler v. Bragg Management Co.*, 39 Cal.3d 290, 702 P.2d 601, 216 Cal.Rptr. 443 (1985) (Mosk, J.), the California Supreme Court construed a California statute which, like the Illinois Contribution Among Joint Tortfeasors Act, abrogated the common law rule that the release of one party released all. The court concluded that the plaintiff who settled with a subsidiary could still proceed against the parent, rejecting earlier decisions construing the same statutory provision. Contra *M/V American Queen v. San Diego Marine Construction Corp.*, 708 F.2d 1483, 1490 (9th Cir.1983); *Fuls v. Shastina Properties, Inc.*, 448 F.Supp. 983 (N.D.Cal.1978).

The *Mesler* court properly drew a distinction between cases where the corporate veil is pierced so that a parent is held liable for the actions of a subsidiary and cases where the parent attempts to evade liability by benefitting from a release that applies to a subsidiary. In cases where the veil is pierced to expose the parent to liability, it is not as though one corporation is held liable for the acts of another corporation; instead a "hole" is "drilled in the wall of limited liability erected by the corporate form." *Id.* 702 P.2d at 607, 216 Cal.Rptr. at 449. Aside from the liability of the parent where the *alter ego* doctrine applies, the corporate form remains intact. Therefore, the veil is pierced only to the extent that justice requires and no further.

While permitting veil-piercing in the above equitable circumstances, the *Mesler* court addressed the situation in which the parent invokes the *alter ego* doctrine to benefit from a release and escape liability. According to its rationale, if the wall of the corporate form remains erect in all other respects, "when the plaintiff settles with only the subsidiary, the parent's liability continues. To hold otherwise would be to defeat the policy of promoting justice that lies behind the *alter ego* doctrine." *Id.* The opinion in *Mesler* provides a credible argument that the *alter ego* doctrine can be invoked to impose liability on a parent even when the plaintiff settles with the subsidiary.[8]

Envirodyne claims that the equities favor its position, and that the Settlement Agreement requires that it be relieved from any further liabilities. However, Envirodyne's desire to remain insulated by the settlement release cannot bar the plaintiffs' claim to benefits, where Envirodyne provides the only recourse for the plaintiffs to recover their vested pension benefits. Therefore, justice can hardly be said to require that the release be interpreted broadly so as to exonerate a party unnamed in the release.

Moreover, Envirodyne does not contest the plaintiffs' claim that the subsidiaries, WSC and EDC, were set up specifically for Envirodyne's purchase of the Division. Yet the plaintiffs allege that the corporate veil should be pierced because the two subsidiaries were grossly undercapitalized and appear to have been set up for no other reason than to insulate the parent, Envirodyne, from potential claims against the Division for pension benefits or other liabilities. See *Pension Ben. Guaranty Corp. v. Envirodyne Industries, Inc.*, 10 EBC 1458, 1462 (N.D.Ill.1988). At least from the perspective of Lehman Brothers, which issued a report concerning the sale by Navistar of the Division to the two subsidiaries of Envirodyne, the transaction was a fraud, and the report demanded that Envirodyne assume responsibility for the pension benefits instead of insulating itself from liability by creating a corporate shell.

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[8] The court in *Mesler* analogized to agency cases in different jurisdictions in which a suit against the principal is not precluded by the release of the agent. *Mesler*, 39 Cal.3d at 303 n. 5, 702 P.2d at 608 n. 5, 216 Cal.Rptr. at 450 n. 5.

Because in all probability Envirodyne has not been released by the Settlement Agreement, the plaintiffs will be able to present their case for piercing the corporate veil in the district court. In order to prevail, the plaintiffs must satisfy the requirements for piercing the corporate veil. Under Illinois law, two factors are required:

> [F]irst, there must be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist; and second, circumstances must be such that an adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice.

Koch Refining v. Farmers Union Central Exch., Inc., 831 F.2d 1339, 1345 (7th Cir.1987), certiorari denied, 485 U.S. 906, 108 S.Ct. 1077, 99 L.Ed.2d 237, quoting *Gallagher v. Reconco Builders, Inc.*, 91 Ill.App.3d 999, 1004, 47 Ill.Dec. 555, 558-59, 415 N.E.2d 560, 563-564 (1980); see also *In re Kaiser*, 791 F.2d 73, 75 (7th Cir.1986) (permitting *alter ego* claims whenever reliance on the corporate form would "defeat some strong equitable claim"), certiorari denied, *Wise v. Kaiser*, 479 U.S. 1011, 107 S.Ct. 655, 93 L.Ed.2d 710. As to the first requirement of the Illinois *alter ego* doctrine, the plaintiff must show the degree of control by the parent by "presenting evidence of misrepresentation; commingling of funds, assets, or identities; undercapitalization; failure to operate at arm's length; and failure to comply with corporate formalities." *Koch Refining*, 831 F.2d at 1345, citing *Main Bank v. Baker*, 86 Ill.2d 188, 205-206, 56 Ill.Dec. 14, 22, 427 N.E.2d 94, 102 (1981).

The second requirement of the Illinois *alter ego* doctrine—that adherence to the corporate form would give rise to fraud or injustice—will apply if the plaintiff proves the existence of either fraud (such as intentional wrongdoing) or injustice. *Koch*, 831 F.2d at 1345. However, proper application of Illinois' test for piercing the corporate veil invariably involves factual questions to be determined by the circumstances of each case. *Id.*, citing *Stap v. Chicago Aces Tennis Team, Inc.*, 63 Ill.App.3d 23, 28, 20 Ill.Dec. 230, 234, 379 N.E.2d 1298, 1302 (1st Dist.1978). In *Koch Refining*, this Court conducted an individualized inquiry based on the Illinois *alter ego* doctrine to conclude that a bankruptcy trustee can pierce the corporate veil to bring an *alter ego* claim against the debtor corporation's shareholders.

D. The Possibility of Bringing Claims Against Envirodyne in the Bankruptcy Proceeding

Envirodyne has two remaining arguments to support its claim that the settlement release should operate to relieve it from liability for the plaintiffs' lost pension benefits. Rather than addressing whether or not Envirodyne actually is released, these arguments concern other provisions in the Settlement Agreement. Defendant's first argument addresses language preventing "any and all claims . . . that have been asserted or could have been asserted in the Chapter 11 bankruptcy proceeding." (Settlement Agreement at 4, reprinted in Plaintiff's Br. at A-21). The question, then, is whether a claim against Envirodyne "could have been asserted" in the Chapter 11 bankruptcy proceeding.

At first glance, it would appear that the answer to the question is "yes." This Court has held previously that *alter ego* claims may be brought in bankruptcy by the trustee of a bankrupt corporation, *Koch Refining v. Farmers Union Central Exchange, Inc.*, 831 F.2d 1339, 1346 (7th Cir.1987). However, the Court recognized that trustees had standing to bring only those claims which apply to all creditors of the debtor corporation generally. *Id.* at 1349. As the Court in *Koch Refining* stated: "If the liability is to all creditors of the corporation without regard to the personal dealings between such officers and such creditors, it is a general claim," *id.* Alternatively, the Court recognized that "the trustee has no standing to bring *personal* claims of creditors. A cause of action is 'personal' if the claimant himself is harmed and no other claimant or creditor has an interest in the cause," *id.* at 1348 (emphasis in original).

In the Chapter 11 proceeding, *In re Wisconsin Steel Company*, Nos. 80 B 3766 through 80 B 3773, Adversary No. 81 A 0442, 1989 WL 39995 (Bktcy.N.D.Ill.), the former employees of the Division comprised only one of the several creditors in the proceeding. They were the only creditors to assert claims for lost pension benefits. Their claims are properly described as personal claims and not general claims. The logic of *Koch Refining* therefore leads necessarily to the conclusion that plaintiffs' *alter ego* claims against Envirodyne could not have been asserted in the bankruptcy proceeding because they were not claims of the creditors generally but ERISA claims unique to the former employees.

E. Envirodyne's Potential Claims Against Navistar

The final argument advanced by Envirodyne in its attempt to show that it was released from claims by the plaintiffs concerns the possibility that Envirodyne might bring claims against Navistar as a result of this litigation. Plainly, the settlement agreement releases Navistar from any further liabilities stemming from its sale of the Division to the subsidiaries of Envirodyne. Therefore, if as a result of this suit Navistar were exposed to additional liability, plaintiffs' suit would violate the terms of the settlement agreement.

In his order granting Envirodyne's motion to dismiss, Judge Moran addressed the possibility that the defendant would bring a claim against Navistar. He concluded that a suit by Envirodyne against Navistar was a possibility at the time that the plaintiffs entered into the settlement agreement. Therefore, it was not, in Judge Moran's view, relevant that at the conclusion of the trial in *Pension Ben. Guaranty Corp. v. Envirodyne Industries, Inc.*, he held that Navistar was liable only for pension benefits accruing until 1977, the year the Division was sold to the subsidiaries of the defendant. See District Court Memorandum and Order of November 7, 1989, at 9-10 (Plaintiffs' Br. at A-10–A-11).

The district court's analysis was incomplete concerning Navistar's potential liability to Envirodyne, for Judge Moran's decision at trial does not provide the only bar to any suit Envirodyne might bring against Navistar. As the plaintiffs correctly point out, their *alter ego* claims against Envirodyne are in fraud, alleging that Envirodyne knowingly set up undercapitalized subsidiaries in order to escape any liabilities for claims arising out of its acquisition of the Division. Envirodyne cannot impute its fraud to another party. If it is liable to the plaintiffs under an *alter ego* theory, then it is liable for its own improper intentional actions and cannot obtain indemnification from Navistar.

Moreover, any right of contribution that Envirodyne might have against Navistar is properly limited by the method this Court has identified for determining contribution rights under ERISA. Contrary to the plaintiffs' assertion, a non-settling defendant does possess a right of contribution under ERISA. *Donovan v. Robbins*, 752 F.2d 1170 (7th Cir.1985). The *Donovan* Court identified this right to contribution, but went on to reject the traditional rule that imposes no limit on the non-settling defendant's right to contribution. *Id.* at 1180. Instead, *Donovan* advocated the adoption of a rule based on comparative fault. Under a comparative fault regime, no party pays more than its adjudicated fair share. As explained in *Donovan*:

> [T]he court fixes the percentage of the plaintiff's damages that is attributable to the fault of the settling defendants, multiplies that percentage by the judgment against the nonsettling defendants, and deducts the resulting amount from the judgment.

Id. Judge Moran has in essence satisfied the comparative fault inquiry recommended in *Donovan* by establishing that Navistar was liable for pension benefits due to the plaintiffs only up to the time of the sale of the Division.[9] Envirodyne no longer has any possible claim against Navistar.[10]

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[9] Judge Moran's ruling is on appeal. See note 1 *supra*.

[10] Although *Donovan* concludes that there is a right to contribution under ERISA, this matter is still unsettled. In a 1989 district court decision,

F. The Applicable Statute of Limitations

Because the district judge concluded that the settlement release applied to Envirodyne, he saw no need to reach the statute of limitations issue. However, because the Settlement Agreement is ambiguous and requires additional fact-finding to determine the parties' intent, it is necessary to address the statute of limitations. Envirodyne raises the issue as an affirmative defense to the suit against it.

The plaintiffs filed suit against Envirodyne in February 1989, nine years after the Division went into bankruptcy. ERISA itself does not impose a statute of limitations under Section 502, the civil enforcement provision; therefore the district court must apply the most appropriate state statute of limitations so long it is consistent with federal law and policy. *Wilson v. Garcia*, 471 U.S. 261, 266-267, 105 S.Ct. 1938, 1941-1942, 85 L.Ed.2d 254; *Central States, Southeast and Southwest Areas Pension Fund v. Jordan*, 873 F.2d 149, 152 (7th Cir.1989).

This Court has held previously that an employee's claimed eligibility for pension benefits is a creature of contract law. *Jenkins v. Local 705 International Brotherhood of Teamsters Pension Plan*, 713 F.2d 247 (7th Cir.1983). Under Illinois law, there are two separate statutes of limitations for actions on contracts. For actions on oral contracts, the statute of limitations is five years. Ill.Rev.Stat. ch. 110, para. 13-205 (1989). Alternatively, a ten-year statute of limitations applies to actions on written contracts. Ill.Rev.Stat. ch. 110, para. 13-206 (1989).

Mutual Life Ins. Co. v. Yampol, 706 F.Supp. 596 (N.D.Ill.1989), Judge Leinenweber concluded that "ERISA does not expressly create a right of contribution in favor of fiduciaries." *Yampol*, 706 F.Supp. at 598. He referred to the opposite conclusion in *Donovan* as dictum and concluded that the fiduciary in that case had failed to satisfy the Supreme Court's preconditions for finding a federal right of contribution under a statute that does not expressly create such a right. See *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 101 S.Ct. 2061, 68 L.Ed.2d 500; *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 101 S.Ct. 1571, 67 L.Ed.2d 750.

To determine which statute of limitations properly applies, the nature of the plaintiffs' claims must be examined. The plaintiffs have brought their suit under ERISA Section 502(a)(1)(B) for lost benefits due to them under the pension plan. Presumably the pension plan in this case is at least written in part, so that the Illinois ten-year statute of limitations applies. Our conclusion is fully consistent with the decisions of this Court in *Jenkins* and *Jordan*. *Jenkins* held that an employee's action to recover pension benefits based on the written terms of a pension plan was governed by the Illinois ten-year statute of limitations, 713 F.2d at 253, and *Jordan* recognized that although the pension plan in that case was based at least in part based on orally conducted collective bargaining negotiations, an ERISA delinquency action was still governed by the ten-year statute of limitations because the longer statute of limitations "contribute[d] to the stability of pension funds and . . . encourage[d] employers to meet their obligations." 873 F.2d at 154.

Despite this Court's decisions in *Jordan* and *Jenkins* applying the ten-year statute of limitations to actions arising under ERISA and the LMRA, Envirodyne argues that the shorter limitations period should apply when an *alter ego* theory is alleged, because parol evidence is indispensable, as the party to be held liable is not named in the contract. As support, defendant cites *Baird & Warner, Inc. v. Addison Indus. Park, Inc.*, 70 Ill.App.3d 59, 73, 26 Ill.Dec. 1, 13-14, 386 N.E.2d 831, 843-844 (1st Dist.1979). That case is distinguishable because it involved purely a matter of state law. The application of a state statute of limitations to a federal cause of action is "ultimately a question of federal law." *Jordan*, 873 F.2d at 154, citing *International Union, etc. v. Hoosier Cardinal Corp.*, 383 U.S. 696, 86 S.Ct. 1107, 16 L.Ed.2d 192; *Jenkins*, 713 F.2d at 251. The decisions of the Illinois courts regarding the applicability of the two statutes of limitations are helpful but not binding, for they do not take into consideration the national interests at stake. *Jordan*, 873 F.2d at 154.

As explained above, as a matter of federal policy the longer statute of limitations should apply, because the plaintiffs' claims are for vested pension benefits that have allegedly become due to them over a period of years. To truncate the available period for claims by applying the shorter statute of limitations would fly in the face of ERISA. Pension benefits vest and accrue throughout the career of an employee. They are often paid out over a period of several decades. Moreover, the difference between the two statutes of limitations may be explained by the fact that parties to a written contract can demonstrate the existence of their bargained-for-exchange over a longer period of time, for the agreement is evidenced by the writing. An oral contract, on the other hand, if not important enough to memorialize in writing, is less deserving of legal protection over time, and liability may be harder to prove, presumably because the parties must rely on memory to recollect the terms of the oral agreement in court.

Despite the fact that some of the plaintiffs' claims are based on the collective bargaining agreement and are brought under the LMRA, there is no basis in federal law for characterizing their claims as an oral contract for purposes of the statute of limitations. See *Trustees of Wyoming Laborers Health and Welfare Plan v. Morgen & Oswood Constr.* Co., 850 F.2d 613, 621 (10th Cir.1988) (Wyoming's ten-year statute of limitations for written contracts applies to actions brought under ERISA and LMRA Section 301). Indeed, federal policy favors the protection of pension benefits, and it would surely yield a result anomalous with the legislative history and purpose of ERISA to nip claims for vested pension benefits in the bud through application of the shorter statute of limitations.

III. Conclusion

This decision paves the way for the plaintiffs to present their case against Envirodyne more fully in the district court. We cannot decide the merits of the plaintiffs' ERISA and LMRA claims for lack of a sufficiently developed record Since the scope of the settlement release comes down to a question of the parties' intent in view of the Settlement Agreement's ambiguity, the matter is remanded to the district judge for a full evidentiary inquiry.

Cause remanded for further proceedings in accordance with this opinion.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

◆

Nov. 7, 1989

No. 89 C 1330

◆

FRANK LUMPKIN, RAFAEL ALVAREZ, DELBERT C. AUGUSTSON, WAYNE SCHWARTZ, FELIX VASQUEZ and JOHN RANDALL,

Plaintiffs,

—v.—

ENVIRODYNE INDUSTRIES, INC.,

Defendant.

◆

MEMORANDUM AND ORDER

◆

MORAN, *District Judge.*

In 1977 International Harvester Company sold its Wisconsin Steel division in a structured arrangement by which EDC Holding Company (EDC), a wholly-owned subsidiary of the present Envirodyne Industries, Inc. (Envirodyne), purchased the assets of the division, which were then held by various subsidiaries of EDC. One of those subsidiaries, WSC Corporation (WSC), operated the steel facilities (Wisconsin Steel) where the plaintiffs in this action were employed. In 1980 EDC and WSC sought bankruptcy protection and Wisconsin Steel permanently closed. In the interim, after the EDC acquisition and prior to or as a result of the closure, employees had acquired pension and contractual rights, and they had pre-existing rights from their employment at International Harvester which EDC and WSC Steel had assumed as part of the acquisition. The bankrupt companies could not pay those obligations or the obligations to a host of creditors, including International Harvester.

Those events led to others. The Pension Benefit Guaranty Corporation (PBGC) accepted the responsibility of paying ERISA pensions and sued International Harvester, claiming on various grounds that International Harvester was liable to it for those pension obligations not only through the time of sale but until Wisconsin Steel closed. The creditors of EDC and WSC claimed in bankruptcy court that the International Harvester was liable to the debtors-in-possession for all debts they had accumulated, or at least (since the realizable assets were but a small fraction of those debts) that International Harvester's claims should be subordinated. The former employees sued International Harvester, *Lumpkin, et al. v. International Harvester Company*, 81 C 6673, (*Lumpkin I*), claiming that International Harvester was responsible to them for pension and contractual obligations not guaranteed by PBGC and arising through the entire period until the closure of Wisconsin Steel.

Ultimately all these disputes came together in this court and they were set for trial. Shortly before trial the parties settled *Lumpkin I* for $14.8 million. The other disputes went to trial, and this court, about a year ago, determined that International Harvester was liable to PBGC to the date of sale but not thereafter, and that it was not liable to the debtors-in-possession.

The former employees now bring this action against Envirodyne, claiming uninsured pension and contract benefits for the period from sale to closure, 1977-1980. As a threshold matter they ask for certification of the same class as was certified in *Lumpkin I*, and that motion is granted. Envirodyne agrees that class disposition is appropriate, but it believes that the class should only include former employees covered by Progressive Steel Workers Union (PSWU) contracts.

Envirodyne has, conceptually, a point. The class representatives are surrogates for the PSWU because that union disappeared with the demise of Wisconsin Steel. Presumably the unions who are parties to other collective bargaining units remain in being and are free to assert their claims, if they wish. As a practical matter, however, the affected employees are few in number and, divided among several unions, still fewer are represented by any of the other unions. Plaintiffs represent that those employees were covered by "me-too" collective bargaining contracts tied to the PSWU contract. Judge Kocoras included them in the *Lumpkin I* class, and there is every reason to believe that those unions acquiesced in being represented by the class in that action. In the absence of some indication that they do not so acquiesce in this action, or some more compelling reason for exclusion than those now presented, we see no reason for defining the class any differently than in *Lumpkin I*.

Envirodyne's motion to dismiss is another matter. Plaintiffs raise claims under both ERISA and § 301 of the Labor Management Relations Act. Both claims rely upon plaintiffs' belief that EDC and WSC were so insubstantial that they can pierce the corporate veil and hold Envirodyne liable for the obligations negotiated by WSC with the PSWU in the 1977-1980 collective bargaining agreements. They claim, in short, that Envirodyne was the alter ego of WSC. Envirodyne contends that both claims are barred by a five-year limitations period applicable to each and that, in any event, the claims were released in the settlement of *Lumpkin I*. Plaintiffs contend that the limitations periods are ten years and deny that the claims were released. We believe that the claims were released, for the reasons set forth below, and grant the motion to dismiss. We therefore do not reach the limitations issues.

Envirodyne has largely managed to stay outside the maelstrom of these various litigations. PBGC named Envirodyne as a defendant because it was, due to common control, an employer. Envirodyne subsequently settled with PBGC for an undisclosed amount, in the context of a statutory scheme which set a cap on liability related to net worth at the relevant time. Envirodyne's net worth was then relatively modest. It has since grown significantly, and during the trial against International Harvester this court recalls some rumblings by the WSC creditors of proceeding in some fashion against Envirodyne. Nothing came of it, and this action has been the only attempt to reach Envirodyne for more than its statutory liability as an employer upon termination of a plan.

At the time of the *Lumpkin I* settlement the plaintiffs had class claims against International Harvester arising from both their International Harvester and WSC periods of employment. They also had bankruptcy claims against WSC, arising from the WSC period which WSC included in its claims against International Harvester. While the WSC period claims, whether viewed as claims directly against International Harvester or indirectly through WSC, were considerably greater than the claims arising from the International Harvester period, the settlement negotiations and the settlement amount largely related to the benefits arising during the International Harvester period, and the claims arising during the WSC period were severely discounted. The results of the trial substantially vindicated that approach.

In any event, at the time of the settlement International Harvester had an interest in resolving both the direct plaintiff claims and their bankruptcy claims which WSC was seeking to advance. The Settlement Agreement resolved "all claims" both in the class action which could have been asserted in the bankruptcy proceeding. The class members were barred and enjoined from prosecuting against International Harvester "either directly or indirectly" any claim related to the settled claims. The WSC damage claims at trial were, consequently, reduced by the prior settlement of the class claims.

Contemporaneously with the final order approving the settlement, counsel for the class raised the possibility of a suit against Envirodyne and noted that the class contended that the settlement did not bar such a suit and that International Harvester contended that it did (and this court noted, not unreasonably, that we would not have to deal with it as a related case if it were ever filed, but without considering that we should deal with it irrespective of the related case rules).

Class counsel, immediately after negotiating the settlement, had, apparently, also written Envirodyne suggesting that the parties negotiate settlement of the claims they now bring in this action and threatening suit if the claims were not settled. Envirodyne demurred, threatened to bring International Harvester, EDC and WSC into any contemplated action, and so advised International Harvester. There, apparently, matters stood until plaintiffs brought this action somewhat less than a year later.

Defendant contends that plaintiffs cannot pursue an alter ego claim against Envirodyne because a claim against Envirodyne could well result in a claim against International Harvester in violation of the Settlement Agreement. Plaintiffs respond that the scope of a release is primarily a matter of intent, that Envirodyne was never explicitly released, that federal law does not require a reservation of rights to preserve rights against an alter ego, that an alter ego is liable not because it is the same company as the released entity but because justice and equity require that the obligations of the alter ego be recognized and that there is no indirect claim against International Harvester.

The issue has been joined here to a considerable extent by reference to emerging law respecting tortfeasors. The time was when the release of one tortfeasor released all, but the wronged party could, upon settling with one tortfeasor, preserve rights against others by using the right magic words, covenanting not to sue, rather than releasing the party with whom the settlement was being made. A specific reservation of rights might, on occasion, be helpful. That the preservation of rights against one party should depend upon the sophistication of the draftsman of the documents memorializing settlement with another was, for many courts, an excessive reliance upon formalism. The federal courts (and federal law controls here) rejected that doctrine and looked, instead, to the intent of the parties. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 343-347 (1971). Reliance upon that formalism in the states has been considerably diminished in recent years by the enactment of contribution statutes.

That history does not, however, answer the question of whether a settlement of claims against one entity releases claims against a related entity, although it has, apparently, influenced that answer. In *Stewart v. Village of Summit*, 114 Ill.2d 23, 499 N.E.2d 450, 101 Ill.Dec. 862 (1986), for example, the plaintiff used the right magic language in a settlement of a tort claim against an employee and thereby preserved a derivative claim against an employer, without any consideration of whether the employer could thereafter seek indemnification from the employee under either prior law or recently enacted contribution legislation. A similar result was reached against an alter ego defendant in a California tort case, *Mesler v. Bragg Management Co.*, 39 Cal.3d 290, 702 P.2d 601 (1985). The California Supreme Court there described its perception of the reasons for the alter ego doctrine, reasons which the plaintiffs warmly embrace here, although the court's decision turned upon an interpretation of the California contribution statute.

We are not, however, dealing with tort claims, and the effect of a settlement with one tortfeasor is persuasive only by analogy. We could just as well look to the effect of a release of a debtor upon the liability of a guarantor or the effect of the release of one obligor upon the liability of a co-obligor. Or we could, as have some courts, analyzed the effect of the settlement from the perspective of the fiction upon which the alter ego concept rests—that, because of various circumstances, the dominating party should be treated as the same entity which was bound. That was the approach followed in *Allied Chemical Corp. v. Randall*, 321 F.2d 320 (7th Cir.1963), the logical result of that approach is that the dominating party cannot be liable if there is no claim against the dominated party. *M/V American Queen v. San Diego Marine Construction Corp.*, 708 F.2d 1483, 1490 (9th Cir.1983); *Rose Hall, Ltd. v. Chase Manhattan Overseas Banking*, 576 F. Supp. 107, 130-131 (D.Del.1983), *aff'd without opinion*, 740 F.2d 956, 958 (3d Cir.1984), *cert. denied*, 469 U.S. 1159 (1985); *Fuls v. Shastina Properties, Inc.*, 448 F. Supp. 983, 989 (N.D.Calif.1978). If that approach were followed here the motion would have to be granted. WSC was the promisor. It has been released. Plaintiffs allege that various circumstances require that Envirodyne be answerable for WSC's obligation, but that obligation no longer exists.

Logic has, however, a limit in evaluating the impact of a concept rooted in notions of fairness and justice and the judicially-sanctioned belief that substance should triumph over form. Perhaps we should consider that impact in light of the bargain that was made. And we evaluate that impact not from the perspective of Envirodyne's alleged wrongdoing in not making provision for plaintiffs' benefits, but from the perspective of the agreement the class made with International Harvester to settle their claims. From that perspective we conclude that the motion should be granted.

Plaintiffs contend that they never intended to release Envirodyne and point to their contemporaneous assertions of liability both to Envirodyne and in court. They were, however, also aware that both Envirodyne and International Harvester were contending that the release was total and that plaintiffs could not proceed against Envirodyne. Clear it is that plaintiffs hoped to preserve rights against Envirodyne. The issue is not, however, their subjective intent but the necessary implications of the bargain which they made.

Alter ego claims could have been brought in the bankruptcy proceeding. *Koch Refining v. Farmers Union Central Exchange, Inc.*, 831 F.2d 1339 (7th Cir.1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 1077 (1988); *Matter of Kaiser*, 791 F.2d 73 (7th Cir.), *cert. denied*, 479 U.S. 1011 (1986). If International Harvester bought its peace on post-sale claims solely as to those asserted by the class against WSC, then there was nothing to prevent the class from seeking to have the same issues raise through claims against Envirodyne as alter ego, with Envirodyne then asserting the employee claims against International Harvester on the same grounds that the debtors-in-possession were asserting with respect to all other unfunded debts. That risk was, as a practical matter, reduced by the imminence of trial; its realization depended upon judicial assent to a tardy expansion of already complex disputes. But it was conceptually, at least, a risk, and the class agreed in broad language not to prosecute thereafter any claim, either directly or indirectly, against International Harvester. In view of the results of the trial it is highly improbable that Envirodyne could now proceed against International Harvester even were this action to proceed. But when the bargain was struck the trial had not yet commenced, and the interested parties could not be certain of the outcome. We believe that by the agreement that was made International Harvester paid for the extinguishment of all class claims, however they might be raised, and that the class assented.

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

◆

Jan. 18, 1990
No. 89 C 1330

◆

FRANK LUMPKIN, *et al.*,
Plaintiffs,
—v.—
ENVIRODYNE INDUSTRIES, INC.,
Defendant.

◆

MEMORANDUM AND ORDER

◆

MORAN, *District Judge.*

Plaintiffs move to reconsider this court's dismissal of their complaint on November 7, 1989. That motion is denied.

Their motion rests upon a number of contentions. They argue that vested, accrued pension benefits cannot be waived by implication but only by clear and express terms; that the intent of the parties at the time controls and they did not intend to release Envirodyne; that the court was well aware of their position when the settlement became effective; that, indeed, pension benefits cannot be waived at all; and that an implication of waiver is contrary to justice and fairness.

As a starting point, we disagree with the view that pension benefits cannot be waived, and we do not believe that *Nichol* *v. Pullman Standard, Inc.*, 889 F.2d 115 (7th Cir. 11/6/89), fairly read, so holds. ERISA does contain an anti-alienation provision, 29 U.S.C. § 1056(d)(1), which, like a spendthrift trust clause, protects a beneficiary from an improvident anticipation of his benefits. But that is far different from a class action settlement of disputed claims. Indeed, if plaintiffs were correct, then their settlement with International Harvester was contrary to law because it compromised the benefits they there claimed.

This court concedes that its conclusions are influenced by its participation in the events which bear upon this dispute. As plaintiffs recognize, International Harvester was keenly interested in avoiding a jury trial in which the debtor in possession could assume the role of representing "the workers." It was then the only "deep pockets" entity on the horizon. EDC and WSC were defunct. Envirodyne itself had limited resources and was not then an attractive target. Its subsequent swift rise was for reasons wholly unrelated to, and, indeed, in spite of, the Wisconsin Steel disaster. International Harvester was willing to buy its peace and avoid a jury trial by payment of a settlement amount which in large measure recognized its pre-sale obligations to its employees, but it was unwilling to place any or much value on plaintiffs' claims that it was liable for post-sale obligations. Plaintiffs, wisely as the trial results established, agreed to release the large but very uncertain bankruptcy claims as part of the settlement.

In the November 7, 1989, Memorandum and Order we referred to the possibility that the plaintiffs might have sought to go after Envirodyne after settlement and before trial, with Envirodyne then seeking indemnity from International Harvester, which we considered a possibility but highly improbable. But let us consider a far more possible scenario. Let us suppose that the debtors in possession had prevailed on their RICO claims. Even with the employee claims eliminated their recovery of treble damages would have satisfied their creditors and upstreamed significant assets to Envirodyne. If the plaintiffs could then have sued Envirodyne then Envirodyne could follow the same path against International Harvester pioneered by the debtors in possession. Perhaps it could have obtained collateral estoppel benefits from the prior judgment, although probably it could not because it did not then control and make common cause with the debtors in possession. We can assume, however, that it would have attempted to do so and that, at the least, it would have obtained significant leverage from the prior judgment.

We refer to that possible outcome not because it could still occur but because the class settlement with International Harvester was agreed upon while the bankruptcy claims were pending. We necessarily must consider the scope of the release not on the basis of what later happened, which included the defeat of the WSC and EDC claims and the rise of a reinvigorated Envirodyne, but from the perspective of well-represented parties seeking to resolve their disputes in the face of myriad risks and uncertainties. The class obtained $14.8 million. They released all claims against International Harvester, direct or indirect. In this Court's view that release necessarily included claims against a third party which, if then advanced, would lead to an assertion by the third party of International Harvester's ultimate liability for the class claim.

/s/ JAMES B. MORAN
James B. Moran
United States District Judge

January 18, 1990

APPENDIX D

LMRA and ERISA Sections

[29 U.S.C.] § 185 [LMRA § 301]. Suits by and against labor organizations

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

[29 U.S.C.] § 1113 [ERISA § 413]. Limitation of actions

No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of—

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;

except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

[29 U.S.C.] § 1132 [ERISA § 502]. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (l) of this section.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if—

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title or section 1021(e)(1) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such

request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(4) of this title. For purposes of this paragraph, an annual report that has been rejected under section 1024(a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 1021(d) of this title with respect to any participant or beneficiary or who fails to meet the requirements of section 1021(e)(2) of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) Service upon Secretary of Labor and Secretary of Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle.

If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of Title 26) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(*l*) *Civil penalties on violations by fiduciaries*

(1) In the case of—

(A) any breach of fiduciary responsibility under (or other violation of) part 4 by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)—

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that—

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be

reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of Title 26.

[29 U.S.C.] § 1303 [ERISA § 4003]. Operation of corporation

(a) Investigatory authority; audit of statistically significant number of terminated plans

The corporation may make such investigations as it deems necessary to enforce any provision of this subchapter or any rule or regulation thereunder, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the corporation shall determine, as to all the facts and circumstances concerning the matter to be investigated. The corporation shall annually audit a statistically significant number of plans terminating under section 1341(b) to determine whether participants and beneficiaries have received their benefit commitments. Each audit shall include a statistically significant number of participants and beneficiaries.

(b) Discovery powers vested in board members or officers designated by chairman

For the purpose of any such investigation, or any other proceeding under this subchapter, any member of the board of directors of the corporation, or any officer designated by the chairman, may administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the corporation deems relevant or material to the inquiry.

(c) Contempt

In case of contumacy by, or refusal to obey a subpena issued to, any person, the corporation may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. The court may issue an order requiring such person to appear before the corporation, or member or officer designated by the corporation, and to produce records or to give testimony related to the matter under investigation or in question. Any failure to obey such order of the court may be punished by the court as a contempt thereof. All process in any such case may be served in the judicial district in which such person is an inhabitant or may be found.

(d) Cooperation with other governmental agencies

In order to avoid unnecessary expense and duplication of functions among government agencies, the corporation may make such arrangements or agreements for cooperation or mutual assistance in the performance of its functions under this subchapter as is practicable and consistent with law. The corporation may utilize the facilities or services of any department, agency, or establishment of the United States or of any State or political subdivision of a State, including the services of any of its employees, with the lawful consent of such department, agency, or establishment. The head of each department, agency, or establishment of the United States shall cooperate with the corporation and, to the extent permitted by law, provide such information and facilities as it may request for its assistance in the performance of its functions under this subchapter. The Attorney General or his representative shall receive from the corporation for appropriate action such evidence developed in the performance of its functions under this subchapter as may be found to warrant consideration for criminal prosecution under the provisions of this or any other Federal law.

(e) Civil actions by corporation; jurisdiction; process; costs; limitation on actions

(1) Civil actions may be brought by the corporation for appropriate relief, legal or equitable or both, to enforce the provisions of this subchapter.

(2) Except as otherwise provided in this subchapter, where such an action is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the violation took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(3) The district courts of the United States shall have jurisdiction of actions brought by the corporation under this subchapter without regard to the amount in controversy in any such action.

(4) Repealed. Pub.L. 98-473, Title IV, s 402(33), Nov. 8, 1984, 98 Stat. 3360.

(5) In any action brought under this subchapter, whether to collect premiums, penalties, and interest under section 1307 of this title or for any other purpose, the court may award to the corporation all or a portion of the costs of litigation incurred by the corporation in connection with such action.

(6)(A) Except as provided in subparagraph (C), an action under this subsection may not be brought after the later of—

(i) 6 years after the date on which the cause of action arose, or

(ii) 3 years after the applicable date specified in subparagraph (B).

(B)(i) Except as provided in clause (ii), the applicable date specified in this subparagraph is the earliest date on which the corporation acquired or should have acquired actual knowledge of the existence of such cause of action.

(ii) If the corporation brings the action as a trustee, the applicable date specified in this subparagraph is the date on which the corporation became a trustee with respect to the plan if such date is later than the date described in clause (i).

(C) In the case of fraud or concealment, the period described in subparagraph (A)(ii) shall be extended to 6 years after the applicable date specified in subparagraph (B).

(f) Civil actions against corporation; appropriate court; awards of costs and expenses; limitation on actions; jurisdiction without regard to amount in controversy; removal of actions

(1) Except with respect to withdrawal liability disputes under part 1 of subtitle E of this subchapter, any person who is a fiduciary, employer, contributing sponsor, member of a contributing sponsor's controlled group, participant, or beneficiary, and is adversely affected by any action of the corporation with respect to a plan in which such person has an interest, or who is an employee organization representing such a participant or beneficiary so adversely affected for purposes of collective bargaining with respect to such plan, may bring an action against the corporation for appropriate equitable relief in the appropriate court.

(2) For purposes of this subsection, the term "appropriate court" means—

> (A) the United States district court before which proceedings under section 1341 or 1342 of this title are being conducted,
>
> (B) if no such proceedings are being conducted, the United States district court for the judicial district in which the plan has its principal office, or

(C) the United States District Court for the District of Columbia.

(3) In any action brought under this subsection, the court may award all or a portion of the costs and expenses incurred in connection with such action to any party who prevails or substantially prevails in such action.

(4) This subsection shall be the exclusive means for bringing actions against the corporation under this subchapter, including actions against the corporation in its capacity as a trustee under section 1342 or 1349 of this title.

(5)(A) Except as provided in subparagraph (C), an action under this subsection may not be brought after the later of—

(i) 6 years after the date on which the cause of action arose, or

(ii) 3 years after the applicable date specified in subparagraph (B).

(B)(i) Except as provided in clause (ii), the applicable date specified in this subparagraph is the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action.

(ii) In the case of a plaintiff who is a fiduciary bringing the action in the exercise of fiduciary duties, the applicable date specified in this subparagraph is the date on which the plaintiff became a fiduciary with respect to the plan if such date is later than the date specified in clause (i).

(C) In the case of fraud or concealment, the period described in subparagraph (A)(ii) shall be extended to 6 years after the applicable date specified in subparagraph (B).

(6) The district courts of the United States have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(7) In any suit, action, or proceeding in which the corporation is a party, or intervenes under section 1451 of this title,

in any State court, the corporation may, without bond or security, remove such suit, action, or proceeding from the State court to the United States district court for the district or division in which such suit, action, or proceeding is pending by following any procedure for removal now or hereafter in effect.

[29 U.S.C.] § 1370 [ERISA § 4070]. Enforcement authority relating to terminations of single-employer plans

(a) In general

Any person who is with respect to a single-employer plan a fiduciary, contributing sponsor, member of a contributing sponsor's controlled group, participant, or beneficiary, and is adversely affected by an act or practice of any party (other than the corporation) in violation of any provision of section 1341, 1342, 1362, 1363, 1364, or 1369 of this title, or who is an employee organization representing such a participant or beneficiary so adversely affected for purposes of collective bargaining with respect to such plan, may bring an action—

(1) to enjoin such act or practice, or

(2) to obtain other appropriate equitable relief (A) to redress such violation or (B) to enforce such provision.

(b) Status of plan as party to action and with respect to legal process

A single-employer plan may be sued under this section as an entity. Service of summons, subpoena, or other legal process of a court upon a trustee or an administrator of a single-employer plan in such trustee's or administrator's capacity as such shall constitute service upon the plan. If a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon any contributing sponsor of the plan shall constitute such service. Any money judgment under this section against a single-employer plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in such person's individual capacity.

(c) Jurisdiction and venue

The district courts of the United States shall have exclusive jurisdiction of civil actions under this section. Such actions may be brought in the district where the plan is administered, where the violation took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found. The district courts of the United States shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(d) Right of corporation to intervene

A copy of the complaint or notice of appeal in any action under this section shall be served upon the corporation by certified mail. The corporation shall have the right in its discretion to intervene in any action.

(e) Awards of costs and expenses

(1) General rule

In any action brought under this section, the court in its discretion may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to any party who prevails or substantially prevails in such action.

(2) Exemption for plans

Notwithstanding the preceding provisions of this subsection, no plan shall be required in any action to pay any costs and expenses (including attorney's fees).

(f) Limitation on actions

(1) In general

Except as provided in paragraph (3), an action under this section may not be brought after the later of—

(A) 6 years after the date on which the cause of action arose, or

(B) 3 years after the applicable date specified in paragraph (2).

(2) Applicable date

(A) General rule

Except as provided in subparagraph (B), the applicable date specified in this paragraph is the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action.

(B) Special rule for plaintiffs who are fiduciaries

In the case of a plaintiff who is a fiduciary bringing the action in the exercise of fiduciary duties, the applicable date specified in this paragraph is the date on which the plaintiff became a fiduciary with respect to the plan if such date is later than the date described in subparagraph (A).

(3) Cases of fraud or concealment

In the case of fraud or concealment, the period described in paragraph (1)(B) shall be extended to 6 years after the applicable date specified in paragraph (2).

[29 U.S.C.] § 1451 [ERISA § 4301]. Civil actions

(a) Persons entitled to maintain actions

(1) A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

(2) Notwithstanding paragraph (1), this section does not authorize an action against the Secretary of the Treasury, the Secretary of Labor, or the corporation.

(b) Failure of employer to make withdrawal liability payment within prescribed time

In any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 1145 of this title).

(c) Jurisdiction of Federal and State courts

The district courts of the United States shall have exclusive jurisdiction of an action under this section without regard to the amount in controversy, except that State courts of competent jurisdiction shall have concurrent jurisdiction over an action brought by a plan fiduciary to collect withdrawal liability.

(d) Venue and service of process

An action under this section may be brought in the district where the plan is administered or where a defendant resides or does business, and process may be served in any district where a defendant resides, does business, or may be found.

(e) Costs and expenses

In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to the prevailing party.

(f) Time limitations

An action under this section may not be brought after the later of—

(1) 6 years after the date on which the cause of action arose, or

(2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

(g) Service of complaint on corporation; intervention by corporation

A copy of the complaint in any action under this section or section 1401 of this title shall be served upon the corporation by certified mail. The corporation may intervene in any such action.

APPENDIX E

Illinois Statutes

[Ill. Ann. Stat., Ch. 110] ¶ 13-205. Five year limitation

§ 13-205. Five year limitation. Except as provided in Section 2-725 of the "Uniform Commercial Code", approved July 31, 1961, as amended,[1] and Section 11-13 of "The Illinois Public Aid Code", approved April 11, 1967, as amended,[2] actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversation thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued.

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[1] Chapter 26, ¶ 2-725.

[2] Chapter 23, ¶ 11-13.

[Ill. Ann. Stat., Ch. 110] ¶ 13-206. Ten year limitation

§ 13-206. Ten year limitation. Except as provided in Section 2-725 of the "Uniform Commercial Code",[1] actions on bonds, promissory notes, bills of exchange, written leases, written contracts, or other evidences of indebtedness in writing, shall be commenced within 10 years next after the cause of action accrued; but if any payment or new promise to pay has been made, in writing, on any bond, note, bill, lease, contract, or other written evidence of indebtedness, within or after the period of 10 years, then an action may be commenced thereon at any time within 10 years after the time of such payment or promise to pay.

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[1] Chapter 26, ¶ 2-725.

APPENDIX F

In the
UNITED STATES DISTRICT COURT
For the Northern District of Illinois

◆

Case No. 89 C 1330

JURY DEMANDED

Judge Conlon

◆

Frank Lumpkin, Rafael Alvarez, Delbert C. Augustson, Wayne Schwartz, Felix Vasquez and John Randall,

Plaintiffs,

—vs.—

Envirodyne Industries, Inc.,

Defendant.

◆

COMPLAINT

The undersigned named plaintiffs, individually and on behalf of themselves and other members of the class described below, allege:

Parties

1. The plaintiffs in this action are the approximately 2,700 former employees of the former WSC Corporation and EDC Holding Company, which were wholly owned subsidiaries of Envirodyne Industries, Inc. ("Envirodyne").

2. The plaintiffs Frank Lumpkin, Rafael Alvarez, Delbert C. Augustson, Wayne Schwartz, Feliz Vasquez and John Randall are all Illinois residents, and each of them had at least 20 years of service in the Wisconsin Steel mill which Envirodyne acquired in 1977.

3. Plaintiffs seek to represent all former employees of Envirodyne and its subsidiaries who (1) belonged to the production and maintenance and the office and clerical bargaining units represented by the Progressive Steel Workers Union ("PSWU" or "Union") or (2) belonged to other bargaining units of employees at the Wisconsin Steel mill which Envirodyne, Inc. acquired in 1977.

4. Defendant Envirodyne is a Delaware corporation licensed to do business in Illinois and a parent company of the former WSC Corporation ("WSC") and EDC Holding Company ("EDC"), both of which filed petitions for bankruptcy in March 1980.

Summary of Claims

5. Plaintiffs seek to pierce the corporate veil and hold Envirodyne liable for the pension and welfare benefits due and owing to them under the 1977-1980 collective bargaining agreement between "WSC Corporation, an Envirodyne company," and the PSWU, a now defunct labor organization that formerly represented plaintiffs.

Jurisdiction

6. Plaintiffs invoke the jurisdiction of this Court pursuant to Section 502(e) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(e), and they seek a declaration of their rights to pension and welfare benefits from Envirodyne under the 1977-1980 collective bargaining agreement and pension plan agreement.

7. Plaintiffs also invoke the jurisdiction of this Court pursuant to Section 301 of the Labor Management Relations Act

("LMRA"), 29 U.S.C. § 185, and seek damages from Envirodyne for the lost pension and other benefits which they were entitled to receive under the 1977-1980 collective bargaining agreement and pension plan agreement.

Class Action Allegations

8. The named plaintiffs seek certification of the class defined above pursuant to Rule 23 of the Federal Rules of Civil Procedure. The named plaintiffs as representatives of the class will represent fairly and adequately the interest of the class. Several named plaintiffs were class representatives in *Lumpkin, et al. v. International Harvester Company*, 81 C 6674 (N.D. Ill.). The claims of the named plaintiffs present questions of fact and law common to the class as a whole. The plaintiff class members are too numerous to join each of them individually in this action. The records of plaintiffs and the Pension Benefit Guaranty Corporation ("PBGC") contain and will disclose the names and addresses of all plaintiff class members. A class action is superior to other available methods for fair and efficient adjudication of this controversy, and the prosecution of separate claims would create the risk of inconsistent or varying adjudications.

COUNT I

Declaration of Rights Under ERISA

(Alter Ego Liability for ERISA Benefits)

9. On July 31, 1977, Envirodyne, Inc. purchased from International Harvester Company ("Harvester") the Wisconsin Steel division in which plaintiffs had worked for over 20 years.

10. Envirodyne agreed to purchase the division, or mill, on the condition that Envirodyne would be insulated from the pension and other liabilities that plaintiffs had accrued and would accrue after the sale.

11. Envirodyne, knowing that the new enterprise would be seriously undercapitalized and unable to pay the massive pension obligations that would be assumed from Harvester as part of the sale, sought to insulate itself from both existing and future pension obligations by setting up two wholly owned subsidiaries, "EDC Holding Company" and "WSC Corporation."

12. As part of the sale agreement, Envirodyne insisted that title to the Wisconsin Steel division would be placed, not in Envirodyne's name, but in the name of the EDC Holding Company.

13. EDC Holding Company, which was itself a paper shell, then set up its own wholly owned subsidiary, WSC Corporation, to take title from EDC Holding Company, and to operate the mill in which plaintiffs worked.

14. In addition, Envirodyne, through EDC Holding Company, set up other subsidiaries to hold title to other assets of the Wisconsin Steel division (i.e., the steel mill inventory and receivables, the two iron-ore mines, and a coal mine), and the effect was to strip the WSC Corporation, in which plaintiffs worked, of assets previously part of the Wisconsin Steel division.

15. EDC Holding Company, and then WSC, assumed liability for $86 million in pension benefits owed to plaintiffs and perhaps another $20-25 million in other non-pension contractual benefits such as severance pay and supplemental unemployment benefits which would be owed to plaintiffs on the closing of the mill.

16. At the same time, EDC was expected to service and fund not only the benefit obligations but also $50 million in debentures to Harvester as part of the leveraged buy-out of the Wisconsin Steel division from Harvester.

17. For at least seven years, the Wisconsin Steel division had been losing money in large amounts, ranging from $20 million to $50 million, and the new enterprise, WSC, which

was stripped of certain assets, was likely to lose at least as much money, without a large new investment of capital.

18. Instead, Envirodyne invested no capital in the new enterprise, and through a Chinese-box use of its two subsidiaries, purported to have none of its own capital at risk.

19. Just prior to sale, in 1977, Harvester requested Lehman Brothers, a New York investment banking firm, to conduct a financial analysis of the transaction.

20. Lehman Brothers, in a written report and oral presentation, strongly recommended that Envirodyne increase its financial commitment to the enterprise, and it warned that Envirodyne's use of the subsidiaries to escape liability for plaintiffs' pension obligations would raise questions about the "appearance" and "reality" of the transaction.

21. Nevertheless, Envirodyne did consummate the sale on July 31, 1977 only on condition that Envirodyne would be insulated from the pension and other liabilities that would be assumed by the Envirodyne subsidiaries, which were mere corporate shells without significant assets to pay even a small fraction of plaintiffs' pensions.

22. At the time of sale and afterwards, Envirodyne knew that the new enterprise was seriously undercapitalized and that WSC and EDC may be unable to meet the existing and future pension liabilities.

23. However, Envirodyne wanted to purchase the mill to try out new environmental technologies, which were being developed by another Envirodyne subsidiary, Envirosonics, Inc., and to serve short-term and pressing financial needs of Envirodyne.

24. Through the structuring of EDC and WSC, Envirodyne recklessly and maliciously sought to shift the risk of the pension liabilities from itself to plaintiffs, while using plaintiffs as pawns in a scheme to save Envirodyne from any risk whatever in the sale transaction.

25. Envirodyne was the alter ego of WSC and EDC, and it used WSC and EDC as its mere instrumentalities to evade its liability to plaintiffs.

26. Envirodyne wholly owned EDC which in turn wholly owned WSC.

27. Certain directors and officers of Envirodyne served as directors of the two subsidiaries.

28. After the sale on July 31, 1977, Dr. Linde, the Chief Executive Officer of Envirodyne, stepped into the ongoing negotiations with PSWU for a new collective bargaining agreement. There was no independent management in place at this time, so much of the bargaining for the 1977-1980 collective bargaining agreement took place directly between the PSWU and Envirodyne management.

29. By December 1977, the parties had agreed to continue and assume the existing pension benefit arrangements and even to add new benefits, including the so-called Rule of 65 shutdown benefit and supplement.

30. The Rule of 65 benefit entitles an employee whose age and service is equal to the number "65" to receive a monthly pension benefit and supplement upon any shutdown or closing of the mill.

31. Furthermore, after the July 31, 1977 sale, and for at least the next two years, representatives of Envirodyne continued to correspond and deal with Harvester about the transfer of the plaintiffs' plan assets and the funding of plaintiffs' pension obligations.

32. Both in 1977 and afterwards, plaintiffs' Union and its officers failed to grasp either that Envirodyne was technically separate from EDC and WSC or that it disclaimed liability for their pensions and other benefits. As Envirodyne knew or should have known, plaintiffs and the Union used the names "Envirodyne," "EDC Holding Company," and "WSC" interchangeably in correspondence and in bargaining, and Envirodyne promoted such confusion. The 1977-1980 agree-

ment refers to "WSC Corporation, an Envirodyne Company." Envirodyne made no reasonable or affirmative effort to advise plaintiffs in a manner understandable to them that Envirodyne disclaimed liability for their pensions.

33. On March 28, 1980, after two years of serious losses, WSC and EDC filed for bankruptcy under Chapter 11 of the bankruptcy laws and have never resumed operations.

34. As of March 28, 1980, the Wisconsin Steel Pension Plan remained severely underfunded.

35. While the PBGC has paid the bulk of the lost pension benefits, plaintiffs still have lost up to $40 million or more, excluding interest, in uninsured pension and contract benefits under the 1977-1980 collective bargaining agreement negotiated with Envirodyne management.

36. As of March 28, 1980, the PSWU, which was an independent, employer-founded union, became defunct and has had no meetings or organizational existence since then.

37. In November 1981, in *Lumpkin et al. v. International Harvester Company*, 81 C 6674, N.D. Ill., several of the above-named plaintiffs brought suit against Harvester for the benefits earned under the 1977-1980 collective bargaining agreement and pension plan, as well as under prior agreements and plans between Harvester and the PSWU.

38. In February 1988, the plaintiff class settled with Harvester for the sum of $14.8 million. The settlement agreement approved by the Court in March 1988 does not release Envirodyne from any liability under the 1977-1980 collective bargaining agreement.

39. Most of the pension and other benefits sought by plaintiffs herein are due and payable in monthly installments over time and are due and owing from Envirodyne only in monthly installments over time.

40. These installments have become periodically due since March 1980, and millions of dollars in such installments will become due and owing from Envirodyne in the future,

including the monthly payments of the Rule of 65 pension benefit, other pension supplemental benefits and health insurance benefits.

41. ERISA Section 502(a)(1)(B), 29 U.S.C. § 1133, states that plaintiffs may bring an action to "recover benefits" due under a plan, "enforce rights" under a plan, or "clarify . . . rights to future benefits" under a plan.

42. ERISA Section 502(a)(3), 29 U.S.C. § 1132, states that plaintiffs may seek other appropriate equitable relief to enforce their rights under a plan.

43. It is abhorrent, repugnant and inequitable that Envirodyne, one of the biggest, most prosperous American corporations, now one of the "Fortune 500," should escape any responsibility for the pension and other benefits earned or acquired by plaintiffs under Envirodyne's ownership.

44. Accordingly, plaintiffs ask the Court to hold Envirodyne directly liable, as corporate "alter ego" and for other equitable and public policy considerations, for the pension and welfare benefits earned by plaintiffs under the 1977-1980 collective bargaining agreement.

COUNT II

Contract Damages Under Section 301

(Alter Ego Liability for LMRA Benefits)

45. Plaintiffs incorporate by this reference paragraphs 1 through 44 above.

46. In May 1987, in the related *In Re Wisconsin Steel Litigation*, (81 C 7076, 81 C 6674 and 81 A 442), still pending before Judge Moran, the United States District Court held that plaintiffs may sue as a class directly against their former employer, Harvester, and did not have to allege unfair representation by the PSWU, which was defunct and had ceased to operate. Furthermore, the Court held that under Section

301 of LMRA, the plaintiff class could sue under the Illinois state-law limitation period for breach of contract.

47. LMRA Section 301 authorizes suits for breach of collective bargaining agreements, including the 1977-1980 collective bargaining agreement.

48. Accordingly, under LMRA Section 301, plaintiffs seek contractual damages from Envirodyne under this agreement, as corporate "alter ego" and for other equitable and public policy reasons. Plaintiffs seek as damages the lost pension and other benefits which plaintiffs earned or acquired under the 1977-1980 collective bargaining agreement, and which Envirodyne has wilfully and maliciously refused to pay. Such damages may now amount to $80 million to $100 million, with prejudgment interest, less the amount of plaintiffs' $14.8 million settlement approved in March 1988 by Judge Moran.

49. By refusing to pay the pension and other benefits due to plaintiffs, as it could easily afford to do, Envirodyne has wilfully and maliciously sought to aggravate the emotional and financial distress of plaintiffs, many of whom are older and unemployed.

50. Most recently, by letter of February 16, 1988, plaintiffs demanded that Envirodyne pay their lost pension and other benefits. By letter of March 3, 1988, Envirodyne again refused to pay the earned benefits lost by plaintiffs and its other employees, although Envirodyne is prospering and is well able to do so.

WHEREFORE, plaintiffs pray this Court to:

A. Declare under ERISA Section 502 that Envirodyne is liable for the benefits due and owing to plaintiffs under the 1977-1980 collective bargaining agreement and pension plan.

B. Grant all other appropriate equitable relief under ERISA Section 502 to enforce plaintiffs' rights to such benefits.

C. Grant plaintiffs compensatory damages from Envirodyne under LMRA Section 301 and ERISA Section 502 for the lost pension and contract benefits earned or acquired by them under the 1977-1980 collective bargaining agreement.

D. Grant plaintiffs punitive damages from Envirodyne under LMRA Section 301 and ERISA Section 502 for its wilful and malicious breach of their pension and contract rights.

E. Grant plaintiffs their prejudgment interest and other appropriate relief, including legal fees and costs.

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Rafael Alvarez

/s/ DELBERT C. AUGUSTSON
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

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ENVIRODYNE INDUSTRIES, INC.,
Petitioner,

—v.—

FRANK LUMPKIN, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, if no uniform federal limitations period is to be applied, this Court's decision in UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966), and federal policy under ERISA mandate that the timeliness of federal claims for employee benefits be governed by the Illinois five year statute of limitations for contracts not exclusively in writing, rather than the different state limitations period that the court below selected to effectuate the policy of ERISA?

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OCTOBER TERM, 1991

ENVIRODYNE INDUSTRIES, INC.,

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FRANK LUMPKIN, ET AL.,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATUTES INVOLVED

The case involves section 502 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132, and section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. The text of these statutory sections is set out in full in the appendix to the petition for writ of certiorari. The decision below applied the Illinois statute of limitations for actions on a contract entirely in writing and considered the statute governing contracts not entirely in writing, Ill. Ann. Stat. ch. 110, ¶¶ 13-205 and 13-206 (Smith-Hurd 1984), each of which also is set out in the appendix to the petition for writ of certiorari.

STATEMENT OF THE CASE

Respondents further state that at the time EDC Holding Company ("EDC"), a wholly owned subsidiary of Envirodyne Industries, Inc. ("Envirodyne") petitioned for bankruptcy under chapter 11 of the Bankruptcy Code, Envirodyne itself was in serious financial difficulty. Envirodyne now, however, is identified as a "Fortune 500" company. Respondents also do not accept the implication that EDC charitably continued to operate during bankruptcy for the benefit of its workers. Petition for Writ of Certiorari ("Petition"), p. 3 n.2. Finally, the Illinois Supreme Court has not decided the applicable statute of limitations for causes of action based upon collective bargaining agreements in the pension context or under an alter ego theory.

SUMMARY OF ARGUMENT

Envirodyne argues for the first time in its petition for writ of certiorari that a uniform federal limitations period should apply to causes of action under § 502 of ERISA. However, the Court as a rule does not decide issues not raised in the courts below. Because it could easily have raised this issue below and failed to, Envirodyne has waived its argument. In fact, prior Supreme Court precedent and appellate court decisions in the Court of Appeals for the Seventh Circuit and sister courts unequivocally established the very standard and argument Envirodyne suggests only now is clear as a result of the Court's opinion in Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S.Ct. 2773 (1991).

Even if the question is properly presented, under longstanding practice, Congress intended by its silence as to a limitations period in § 502(a)(1)(B), that courts adopt state statutes of limitations. This assumption is especially relevant where Congress was not silent as to the limitations period in other sections of ERISA. Moreover, no other federal law clearly provides a closer analogy than state law to respondents' cause of action. Nor do federal policy or the practicalities of litigation suggest that federal law is a significantly more appropriate vehicle of interstitial lawmaking. Indeed, the state law limitations period selected by the appellate court is most consistent with the policy of ERISA.

Respondents claims under § 502 of ERISA and § 301 of LMRA are not interdependent, hybrid claims, but wholly separate causes of action intended to effectuate different federal policies. Thus, these claims need not be governed by the same limitations period. Moreover, § 301 establishes an express cause of action. Therefore, the Court's decision in Lampf, which involved a judicially implied cause of action, is irrelevant, and the Court's decision in UAW v. Hoosier Cardinal Corp. is applicable.

Finally, the Court of Appeals for the Seventh Circuit correctly and expressly found that Illinois' ten-year statute of limitations period for written contracts was most consistent with ERISA's policy to protect earned pension benefits, not the five-year limitations period for oral contracts. This finding is not inconsistent with Hoosier Cardinal, which involved different policy concerns and which contemplated that the limitations period applicable to § 301 could vary depending on the nature of the claim.

ARGUMENT

I. Envirodyne Has Waived Its Argument That The Limitations Period Applicable To Causes Of Action Under Section 502(a)(1)(B) Of ERISA Should Be Derived From Federal Law.

For the first time, and purportedly on the basis of the Court's decision in Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S.Ct. 2773 (1991), Envirodyne argues that a writ of certiorari should issue so that the Court may establish a uniform limitations period for causes of action under § 502 of ERISA, 29 U.S.C. § 1132. As a rule, however, the Supreme Court "does not decide questions not raised or resolved in the lower court." Youakim v. Miller, 425 U.S. 231, 234 (1976). "It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." Id. (quoting Duignan v. United States, 274 U.S. 195, 200 (1927)). See also Patrick v. Burget, 486 U.S. 94, 99 n.5 (1988) (Court declines to consider questions presented in a petition for certiorari not considered below).

Envirodyne acknowledges, albeit offhandedly, that it failed to argue in the courts below that federal law was the proper source for a limitations period under § 502. See Petition, p. 6 n.4. Moreover, there is nothing about Envirodyne's failure that renders it an exceptional case warranting departure from the general rule. See e.g., Youakim v. Miller, 425 U.S. 231 (1976) (subsequent agency interpretation and Solicitor General's opinion that a conflict existed between state and federal law was not available to parties below); Pollard v. United States, 352 U.S. 354, 359 (1957) (party failing to raise significant issue was acting pro se).

Envirodyne contends that it failed to argue in the courts below that federal law was applicable on the basis of "the Seventh Circuit's unequivocal decisions applying only state law . . . and litigating prior to Lampf, Pleva." Petition, p. 6 n.4. This argument is demonstrably specious. First, the Court of Appeals for the Seventh Circuit in Central States S.E. & S.W. Areas Pension Fund v. Jordan, 873 F.2d 149, 152 (7th Cir. 1989), held that "the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy." (quoting Wilson v. Garcia, 471 U.S. 261, 266-67 (1985) (emphasis added). This is precisely the standard Envirodyne now suggests this Court apply to impose a uniform limitations period derived from federal law to causes of action based on § 502 of ERISA.

Second, other federal courts purportedly had previously either adopted or suggested a federal, rather than a state law, limitations period for § 502. See Petition, p. 8 (and cases cited therein). Thus, at the time Envirodyne was litigating in the courts below, the argument was not innovative or unpredictable.

Finally, Envirodyne suggests that Lampf requires review of this issue because the Court's opinion there "now makes clear [that] the courts must consider federal as well as state sources of law in determining the limitations period applicable to federal claims for which Congress has not expressly provided a statute of limitations." Petition, p. 6 (emphasis supplied). Not only is Lampf, which involved a judicially implied right of action, irrelevant, see infra p. 13-15, Envirodyne's argument is wrong. The Court recognized long before Lampf the applicability of federally derived limitations periods when the use of a state statute of limitations would frustrate the policy underlying the federal enactment. See DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 172 (1983) (borrowing limitations period from § 10(b) of the NLRA for hybrid § 301/duty of fair representation claim); see also Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143 (1987) (borrowing Clayton Act limitations period for RICO civil action).

Thus, Envirodyne had available to it the rules of decision to raise before the courts below the very argument it presents to this Court for the first time in its petition for writ of certiorari. It did not. Instead of arguing that the appellate court should reconsider its resort to state statutes of limitations under § 502, in light of Supreme Court precedent and sister court decisions, Envirodyne consistently argued only the applicability state law.

See Brief of Defendant-Appellee, pp. 30-33.[1] It must now abide by its litigation choice.

II. In Enacting Section 502 Of ERISA Congress Intended That Courts Adopt State Statutes of Limitations.

A. The Statutory Scheme Requires Courts To Adopt State Limitations Periods For Causes of Action Under § 502(a)(1)(B).

Even assuming that Envirodyne may now raise its argument that a uniform federal limitations period should apply to causes of action under § 502 of ERISA, that argument is flatly inconsistent with congressional intent. As this Court has stated previously, ERISA is a "comprehensive and reticulated statute. Nachman Corp. v. PBGC, 446 U.S. 359, 361 (1980). Accordingly, the Court has been "reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA." Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 147 (1985). Yet that is just the type of judicial legerdemain that Envirodyne seeks.

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[1] In significant contrast, the defendant in Short v. Belleville Shoe Mfg., 908 F.2d 1385, 1386-87 (7th Cir. 1990), which involved the same issue as Lampf, argued in the lower court that the court should cease looking at state law and establish a uniform federal limitations period under Rule 10b-5, in spite of a wall of contrary precedent, on the authority of Agency Holding. Petitioners in Lampf similarly argued in the courts below that a federal limitations period should apply notwithstanding controlling precedent in the Ninth Circuit. Lampf, 111 S.Ct. at 2777. Envirodyne's suggestion that it could not have raised the argument that federal law supplies the limitations period for § 502 is patently erroneous.

Section 502 does not contain an express limitations period. Congress' silence, however, is not without significance. "Given [the Supreme Court's] longstanding practice of borrowing state law, and the congressional awareness of this practice, we can generally assume that Congress intends by its silence that we borrow state law." Agency Holding, 483 U.S. at 147. In this context, "there is no justification for the drastic sort of judicial legislation" necessary to devise a uniform federal limitations period. UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 702-03 (1966).

Notwithstanding this black letter rule, Envirodyne argues on the basis of Lampf that the Court should act legislatively to adopt the limitations period contained in unrelated provisions of ERISA. Respondents may agree in the abstract that there is "no clearer indication of how Congress would have balanced the policy considerations implicit in any limitations provision than the balance struck by the same Congress in limiting similar and related protections." Lampf, 111 S.Ct. at 2780; Petition, p. 13. Unfortunately for Envirodyne, that is not the case here. Because Lampf involved a judicially implied cause of action, the Court's "task [was] complicated by the nontraditional origins of the § 10(b) cause of action." Lampf, 111 S.Ct. at 2779. Obviously, under these circumstances, "consideration of state-law alternatives [is] unnecessary where Congress has provided an express limitations period for correlative remedies within the same enactment." Id. at 2782.

Here, however, the cause of action is express. The Court need not surmise how Congress would have struck the balance: Congress did strike the balance. For certain causes of action under ERISA, Congress determined that a uniform federal limitations period was appropriate. See e.g., § 413, 29 U.S.C. § 1113 (breach of fiduciary duty); § 4003, 29 U.S.C. § 1303 (claims by and against the PBGC). At the same time, Congress did not provide a limitations period for § 502, thereby intending that courts apply state statutes of limitations to causes of action under § 502. It is ludicrous to suggest that

Congress' deafening silence in this regard was an oversight.[9] Envirodyne may be dissatisfied with the "chaos" Congress' choice creates, but this is not the proper forum to resolve that dissatisfaction. It is not the business of courts to engage in a fundamental rewriting of federal law.

B. Respondents Cause of Action Under § 502(a)(1)(B) Does Not Fit Within The Narrow Exception To The Applicability Of State Law.

The Court has recognized "a closely circumscribed exception to the general rule that statutes of limitation are to be borrowed from state law." Reed v. United

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[9] Envirodyne's argument that courts are preempted from borrowing state statutes of limitations by ERISA borders on the frivolous. Even assuming that statutes of limitations are the type of substantive law potentially preempted by ERISA, see Hoosier Cardinal, 383 U.S. at 703 n.4, state statutes of limitations do not apply by force of state law; rather Congress, by its silence, in effect incorporates state statutes of limitations into federal law. Thus, to argue that such state statutes are preempted simply begs the question.

Transp. Union, 488 U.S. 319, 324 (1989). The Court will look to federal law "only 'when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking.'" Id. (quoting DelCostello, 432 U.S. 151, 172 (1983)). However, "[r]ooted as it is in the expectations of Congress, the 'state-borrowing doctrine' may not be lightly abandoned." Lampf, 111 S.Ct. at 2778 (plurality). Accordingly, "application of a federal statute will be unusual." Reed, 488 U.S. at 324.

In DelCostello, for example, the Court found that there was simply no close analogy in ordinary state law for the hybrid federal claim at issue and further that the closest state statute of limitations failed to provide a sufficient opportunity to vindicate the federal right. DelCostello, 462 U.S. at 165-66. Similarly, in Agency Holding, the court concluded that the cause of action involved (RICO) "encompasses numerous and diverse topics and subtopics" predicated upon a pattern of racketeering and enterprise - - concepts "simply unknown at common law." Agency Holding, 483 U.S. at 149-50. The Court also "found an explicit intent to pattern the RICO private remedy after the Clayton Act's private antitrust remedy." Lampf, 111 S.Ct. at 2785 (Stevens, J., dissenting).

Envirodyne has failed to demonstrate that it falls within this "narrow exception." Respondents' cause of action under § 502(a)(1)(B) is a straightforward claim to recover benefits due under the pension plan. This is a textbook breach of contract claim under state law. Indeed, Envirodyne does not argue that state law does not provide a close analogy to respondents' claims. Instead, Envirodyne makes the strained comparative that causes of action in other sections of ERISA provide a closer analogy. Petition, p. 13. Specifically, Envirodyne argues that § 413 (breach of fiduciary duty) and § 4003 (claims by and against the PBGC) are more closely analogous to actions under § 502 of ERISA. Petition, pp. 14-15.

A claim for breach of fiduciary duty, with the unique and substantial obligations imposed on a fiduciary, is qualitatively different from a breach of contract claim. Nor is it surprising that Congress would impose a different limitations period for suits by or against the Pension Benefit Guaranty Corporation ("PBGC"). Congress established the PBGC to administer plan termination rules and to provide pension benefit insurance for covered defined benefit plans. Congress understandably was more concerned about the potential financial burdens placed on the PBGC and the fair and efficient functioning of this federally created insurance agency. This concern is significantly different from one where the dispute is between a plan and its participants. Thus, the express limitations period applicable to claims involving § 413 and § 4003 do not clearly provide a closer analogy than state law.[3]

Envirodyne also fails to articulate any policy of ERISA that would be disserved by borrowing state statutes of limitations. The fundamental goal of ERISA is "to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due to participants." S. Rep. No. 127, 93d Cong., 1st Sess. 35 ("Senate Report"), reprinted in 1974 U.S. Code Cong. & Admin. News 4838, 4871. "One of Congress' central purposes in enacting this complex legislation was to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid." Nachman, 446 U.S. at 374 (footnote omitted); see also Russell, 473 U.S. at 148 (recognizing repeatedly emphasized purpose of ERISA to protect contractually defined benefits). This is precisely the federal policy considered by the appellate court in concluding that Illinois' ten-year statute of limitations applicable to written contracts would best protect the rights of pension plan participants and was most consistent with the policy underlying ERISA. App. at 29a-30a.[4]

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[3] It should be noted that "the mere fact that state law fails to provide a perfect analogy to the federal cause of action is never itself sufficient to justify the use of a federal statute of limitations." Agency Holding, 483 U.S. at 147.

The constant refrain in Envirodyne's argument is that the goal of ERISA is to impose national uniformity in the area of pension benefits. Envirodyne contends that the need for uniformity "compel[s] the selection of the ERISA limitations period for ERISA claims." Petition, p. 16. Aside from being a non sequitur,[5] Envirodyne's argument proves too much. Uniformity is a laudable goal certainly. See Hoosier Cardinal, 383 U.S. at 702-03. But the overriding goal of ERISA is to protect pension rights. And, in this context,

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[4] References to the appendix to the petition for writ of certiorari are cited as "App. at _____."

[5] The goal of uniformity would be equally well served, and ERISA policy better served, by applying a uniform 10 year statute of limitations for causes of action under § 502(a)(1)(B). Nothing inherent in the notion of uniformity compels the selection of any particular limitations period, just that a single period or type be selected.

Congress may simply not have wished to diminish any longer limitations periods available in the various states. This is a rational legislative choice.

Significantly, Envirodyne's argument could be made in every case that federal courts borrow from state law. Inherent in this concept is the potential for variation. Thus, taking Envirodyne's argument at its face, every case would be a case for uniformity, so that the exception necessarily would swallow the general rule. Yet this Court has steadfastly reiterated that "application of a federal statute will be unusual." Reed, 488 U.S. at 324. Accordingly, courts are bound to borrow state law limitations periods "absent some compelling demonstration" that the federal policies at stake make a federal limitations period significantly more appropriate. Id. at 327. Relying as it does solely on the need for uniformity, Envirodyne fails to make that compelling demonstration.

Finally, the practicalities of litigation similarly do not compel the Court to create a federal limitations period for causes of action under § 502(a)(1)(B). Envirodyne argues that potential or actual variation in "the applicable limitations period under ERISA § 502 [is] particularly problematic." Petition, p. 16. The short and simple answer to this concern is that, even if true, it embodies the enforcement mechanism enacted by Congress. It is without the power of the courts to alter that statutory scheme simply for judicial expedience.

In addition, the litigation difficulties are overstated. First, as demonstrated above, a claim under § 502(a)(1)(B) is "readily analogized" to a breach of contract action for purposes of determining the applicable state statute of limitations. Cf. Reed, 488 U.S. at 326. For this reason, the majority of courts have so characterized such claims. See Petition, p. 10. Thus, the litigation uncertainty suggested by Envirodyne is more imagined than real. Second, courts regularly make, and potential litigants anticipate, precisely the kind of choice-of-law determinations that Envirodyne argues are intractable. This hardly suggests that federal law is the only practical source of a limitations period for § 502.

The Court must assume by Congress' silence that Congress intended for courts to apply state statutes of limitations to § 502(a)(1)(B). As other contemporaneous sections of ERISA demonstrate, Congress knew how to select a uniform federal limitations period when it deemed such uniformity appropriate. In § 502, it did not. That choice ends this Court's inquiry. Moreover, Envirodyne has failed to demonstrate that any federal law clearly is a closer analogy or that federal policy and the practicalities of litigation make a uniform federal limitations period a significantly more appropriate vehicle for interstitial lawmaking. For these reasons, the Court should deny Envirodyne's petition for writ of certiorari.

III. The Relationship Between The Court's Decisions in Lampf and Hoosier Cardinal Is Not Murky.

Envirodyne argues, on the basis of DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), that respondents' "hybrid ERISA § 502- LMRA § 301 claim should be governed by one limitations period." Petition, p. 20. This argument is without merit. A hybrid § 301/duty of fair representation claim is more than a separate, but identical, claim that makes a uniform limitations period convenient. It is a single action that "yokes together interdependent claims that could only very impractically be treated as governed by different statutes of limitations." Reed, 488 U.S. at 329 n.4.

To characterize the separate claims brought by respondents as similarly hybrid in nature is far-fetched. In fact, although perhaps not unusual, it is a mere fortuity, rather than a requisite interdependence, that a participant has both a claim for benefits under a pension plan and for breach of a collective bargaining agreement. Obviously, millions of employees are participants in a pension plan without being covered by a collective bargaining agreement.

Perhaps more importantly, § 502 of ERISA implements a federal policy to protect employee pension benefits "that simply had no part in the design of a statute of limitations for unfair labor practice charges." Id. at 332. Thus, the dictate of Hoosier Cardinal to borrow state law is fully applicable to respondents separate § 301 claims.

Envirodyne further argues that Lampf applies to respondents' § 301 claim even if that claim is regarded separately from their § 502 claim. It abuses logic, however, to contend that because Congress left the substantive contours of § 301 to the judiciary and federal common law, a § 301 claim is "functionally equivalent to a judicially implied cause of action." Petition, p. 21. Section 301 expressly creates a cause of action. It is silent as to the limitations period for such actions. This silence, however, conveys a congressional intent that the courts borrow analogous state statutes of limitations. Therefore, nothing about a § 301 cause of action is implied. What Envirodyne means to say is that it does not like the general rule, to which it can offer no legitimate exception. Unfortunately for Envirodyne, such wishful thinking is not a sufficient basis for the Court to issue a writ of certiorari.

IV. The Holding Of The Court Of Appeals For The Seventh Circuit Is Consistent With Federal Policy And Does Not Conflict With Hoosier Cardinal Or The Decisions Of Other Courts Of Appeals.

A court should accept the characterization of an action that state law would impose unless that characterization is unreasonable or inconsistent with federal policy. Hoosier Cardinal, 383 U.S. at 706. Incredibly, Envirodyne argues that the Court of Appeals for the Seventh Circuit failed to make the crucial finding that the Illinois choice-of-law limitations period was inconsistent with federal policy. Petition, p. 24.

However, the finding of the appellate court could not be plainer. Although it found the decisions of the Illinois courts helpful, the court concluded that it was not bound by those decisions because "as a matter of federal policy the longer statute of limitations should apply, because [respondents'] claims are for vested pension benefits that have allegedly become due to them over a period of years. To truncate the available period for claims by applying the shorter statute of limitations would fly in the face of ERISA." App. at 29a-30a (emphasis added). The court further concluded that "it would surely yield a result anomalous with the legislative history and purpose of ERISA to nip claims for vested pension benefits in the bud through application of the shorter statute of limitations." App. at 30a.

Envirodyne also argues alternatively that the appellate court misconstrued federal policy under ERISA. In fact, the appellate court's holding best effectuates the core purpose underlying ERISA. It is the policy of ERISA to eliminate procedural obstacles to employees' otherwise rightful recovery of pension benefits, not to allow employers to avoid the responsibility to pay promised and anticipated benefits. See Senate Report at 4871; supra, pp. 19-20; App. at 20a. The ten-year statute of limitations is most consistent with this fundamental federal policy.[6]

This result is fully consistent with Hoosier Cardinal, which dealt with a cause of action under the LMRA, and implements a far different federal labor policy, and the need to resolve labor disputes efficiently. The policy considerations at work in Hoosier Cardinal are simply inapposite here. In addition, nothing in Hoosier Cardinal requires that respondents' claims under § 301 be characterized as based on an oral contract. Indeed, the Hoosier Cardinal Court expressly stated that "[w]hether other [§ 301] suits different from the present one might call for the application of other rules on timeliness, we are not required to decide." Hoosier Cardinal, 383 U.S. at 705 n.7. Thus, Hoosier Cardinal contemplated that the appropriate limitations period under § 301 might change depending on the nature of the claim.

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[6] The argument that shorter statutes of limitations are not repugnant to ERISA misses the point. As demonstrated above, the ERISA sections cited by Envirodyne are not analogous to claims under § 502(a)(1)(B).

Respondents essentially seek pension benefits due them under a collective bargaining agreement. Indeed, Envirodyne characterizes respondents' claims under § 301 as ones "in which other closely related federal statutes are implicated." Petition, p. 21. Envirodyne cannot have it both ways. It is this fundamental relationship and the overarching federal policy to protect employees' pension benefits that requires that the longer limitations period apply to respondents'

§ 301 claims. This conclusion is not contrary to Hoosier Cardinal and, for this reason, the Court of Appeals for the Seventh Circuit did not err.

CONCLUSION

For the foregoing reasons, the requested writ of certiorari should not issue.

Respectfully submitted,

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